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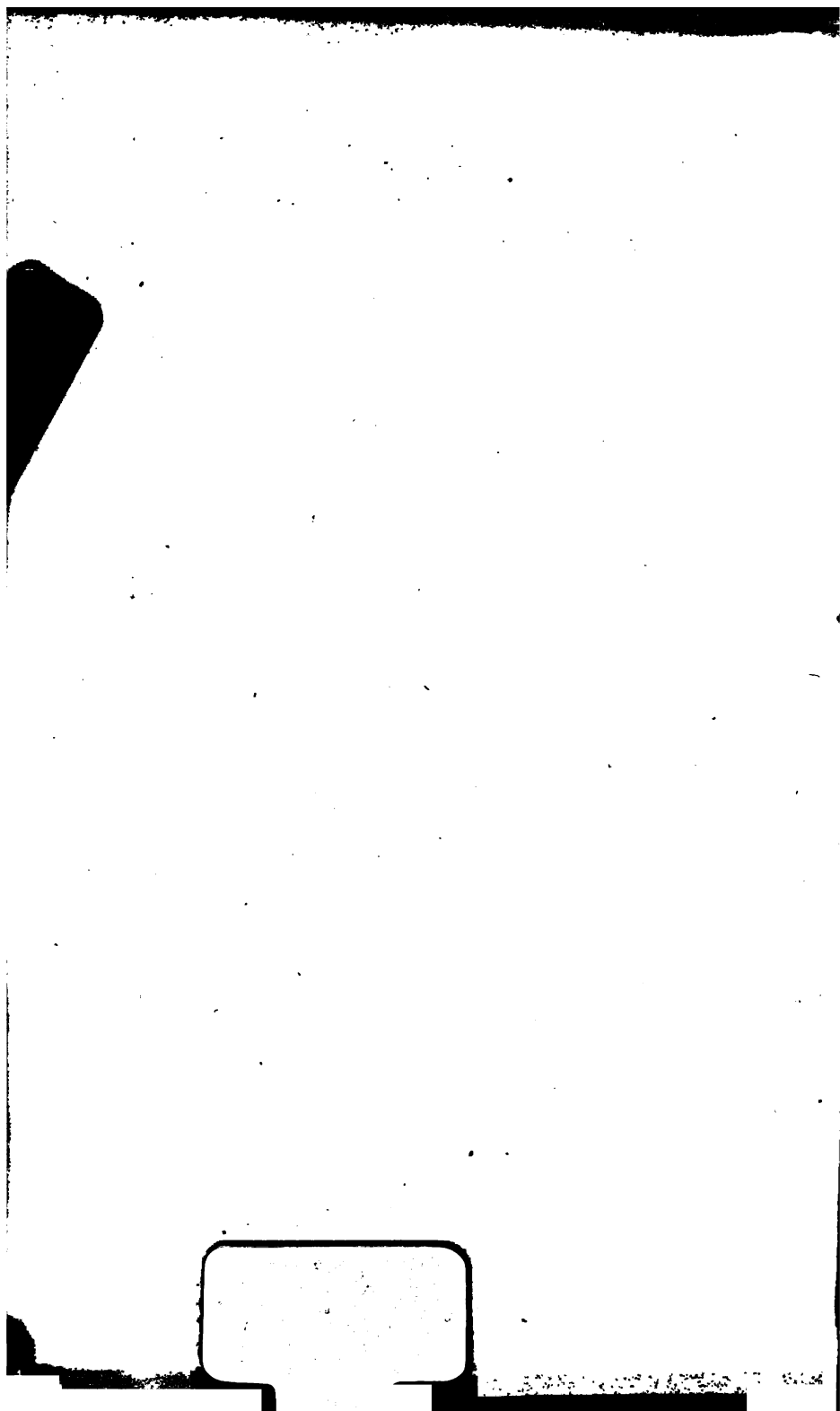
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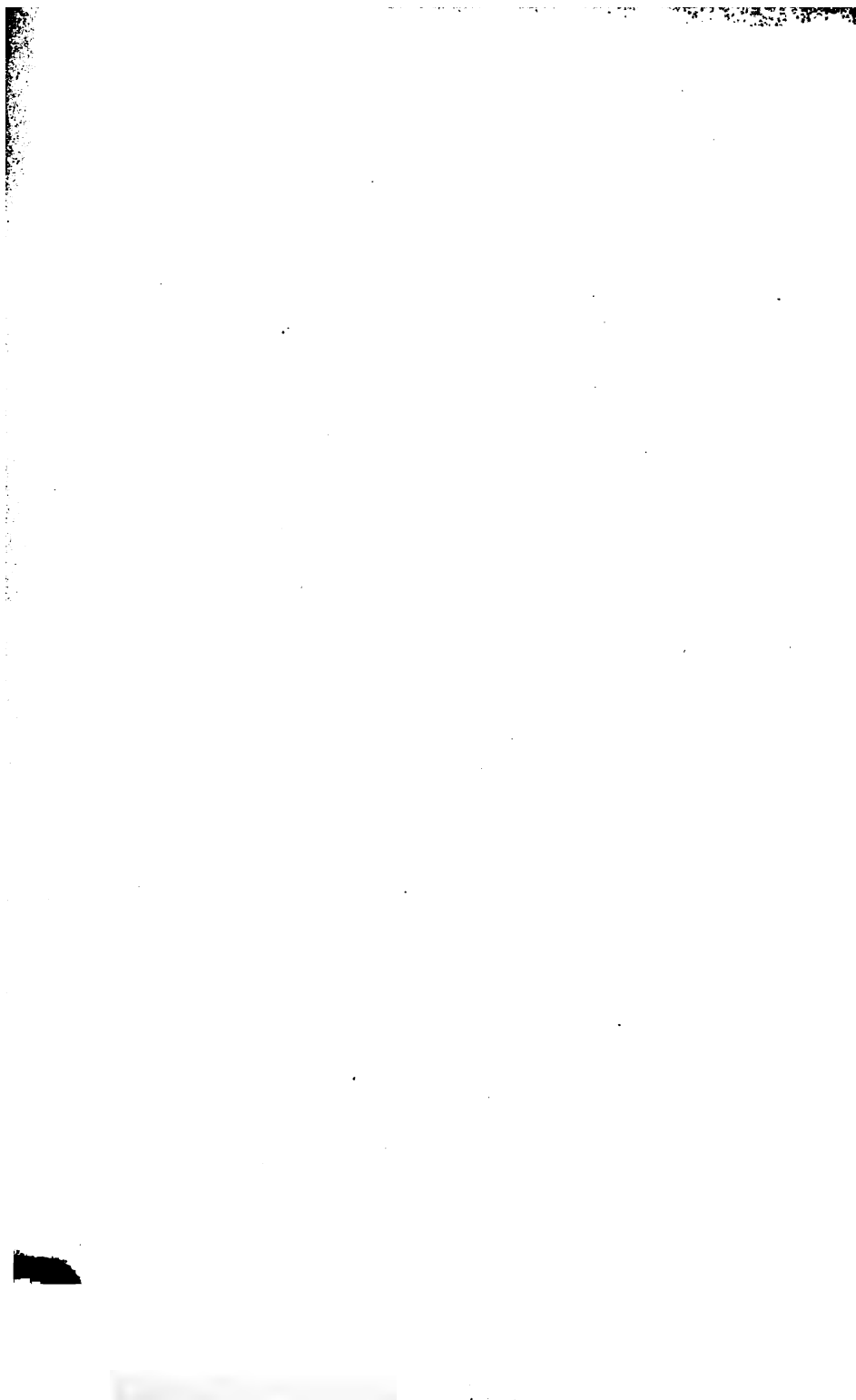


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# REPORTS

OF

## CASES

TRIED IN THE

### JURY COURT,

AT EDINBURGH, AND ON THE CIRCUIT,

FROM NOVEMBER 1828 TO JULY 1830,

BOTH INCLUSIVE.

By JOSEPH MURRAY, Esq.

ADVOCATE.

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VOL. V.

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EDINBURGH :

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## INTRODUCTION.

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**T**HERE was prefixed to the First Volume of the Reports of Cases tried in the Jury Court, an Introduction, in which the term Pleading, which is usually applied in Scotland to the *viva voce* argument of Counsel, was used to express the written statement of a case contained in the Summons and Defences, Condescendence, and Answers; and, from the difficulty of finding any other appropriate term by which to designate that statement, the same term is used, and the same meaning attached to it, in the following observations.

There was also an Appendix added to the volume, containing the Condescendences, Answers, and Issues in three cases, to show the nature of the Issues and of the materials from which they were

drawn. Since that period important alterations have taken place in the frame of the Issues, and also an improvement in the Condescendences and Answers ; but it is still necessary to introduce much greater accuracy into the Condescendences and Answers.

The recent change which has taken place by the abolition of the Jury Court as a separate tribunal,—the publication of reports of the last cases tried in that Court,—and the introduction of trial by Jury into the Court of Session, suggest this as a fit opportunity for improving the mode of pleading, applicable to cases to be tried by Jury. That some change is necessary, notwithstanding the improvement which has taken place, any one who attentively considers the subject must admit, though they may not approve of the change suggested in the following brief hints.

The principle on which pleadings in cases to be tried by a Jury are drawn, differs from that on which they were formerly framed ; and the object now is to assist, as far as possible, that mode of administering justice which Parliament has sanctioned. It may appear to be a very humble object to attempt to improve the form of a Summons or Condescendence, but on consideration it will be found that justice is deeply involved in the rules

which regulate the form and manner in which a case is stated.

The object of the following pages is to point out to those who are practically engaged in framing these papers what appears redundant in them ; and to suggest that the principle to be kept in view in cases which are to be decided on a pure point of law, or on facts which must go to proof before a Jury, is different from that of cases where it is uncertain whether a proof will be allowed, and which may be decided by a Judge on probability.

Most of the suggestions which follow have occurred in the course of preparing issues, in which the attention is very particularly called to the previous pleadings in the case ; and, feeling assured that the importance of the subject has not been sufficiently attended to, the following hints, though crude, are brought forward in the hope that they may be the means of fixing on the subject, the attention of some one better qualified for the task.

By the term Pleading is not meant that system which is followed in England, far less is it intended to recommend its adoption. But what is proposed at present is to take our own system, and try whether any improvements can be suggested, or any rules enforced, by which it might be confined to the real object which ought to be

kept in view. It is wished still farther to limit these observations, and to confine them not only to our own system, but to that system as applicable to cases to be tried by Jury, in which it is evident that the pleading ought to be very different from that applicable to cases tried by Judges in the Court of Session.

Under the former system, before the introduction of trial by Jury, the object of pleading was different from what it is in cases to be tried by a jury. In the Court of Session cases were frequently decided without a proof, and therefore the object of the Judge was not merely to have the facts stated which, if proved, would decide the question, but to have the other facts connected with the case also brought before him, that, on a view of the whole, he might judge of the probability of the truth of the facts stated as the grounds of the action or defence. This being the object of the Judge, that of the party was obviously to state all that made his own case appear probable, and that of his opponent improbable. The consequence was, that every thing bearing on the case was stated, the only object being, that the averment or admission should as little as possible support the case of the opposite party. Having got into so wide a field, it is not wonderful that the truth of the averments was not very scrupulously inquir-



ed into by the party, and that he was not very attentive to the distinction of what facts were, and what were not, essential to his case.

For attaining the object at that time in view, and excluding argument from the pleadings, the Acts of Sederunt of the Court were well fitted, though in practice the regulations in these acts were often overlooked. But the object now being different, a different mode of proceeding should be adopted.

The object formerly was to inform the mind of the Judge as to the facts of the case, so far as these could be known from the mutual averments and admissions of the parties without proof,—the object now is to inform the opposite party of the facts which, when proved, will support the action or defence. It is not intended at present to point out the great advantage which, under the former system, the unprincipled litigant had over the honest and fair one ;—how, by boldly averring as true what he knew to be false, or artfully concealing what he knew to be true, the one could gain an undue advantage over his antagonist. The object is to point out the difference in the species of averment applicable to a case, that must go to proof, from that in one which may be decided by the Judge on probability.

Much of the difficulty and confusion which rests

on this subject as applicable to cases to be tried by a Jury, arises from the remains of the practice under which cases were stated, not with a view to proof, but for decision by a Judge, and in which, of course, statements were made for the purpose of satisfying the Judge, not only that the statements could be proved, but that they were probable. The parties not only stated the facts which they undertook to prove as necessary to support their action or defence, but also the facts and circumstances by which they endeavoured to satisfy the Judge, without proof, that they were true, and that a decision ought to be given in their favour. In doing so, it is extremely difficult to keep to the essential facts, and to direct averment and admission; arguments and conclusions deduced from the facts will, without intention, be stated; and if this is the case, where the intention is to avoid it, how much more will it be the case when that is not much attended to, and where there is a strong motive for inserting it, viz. that the Judge may be induced to decide the case without proof.

It might not be difficult to point out the origin of some of the present errors in pleading; and as the reason which has induced the Court to sanction them is clearly pointed out by Mr Cleghorn, W. S. in his answer to the Commission

appointed under the Stat. 4 Geo. IV. c. 85, I shall transcribe part of what is there stated. “ In-  
“ stead of at once sending the parties to proof,  
“ it has been the practice in the Court of Session,  
“ where parties differ in their statements, to en-  
“ deavour, by order of Court, to compel them to state  
“ the whole facts they rely on, and for the Judges,  
“ on their own interpretation of the facts, as stated,  
“ to decide the cases. The intention in doing so  
“ proceeds from the benevolent motive of *saving*  
“ *the parties the expence and trouble of proving*  
“ *their case,*” &c.

“ After every effort hitherto made by the Court  
“ to obtain such statements they have not been  
“ faithfully made by both pursuer and defender,  
“ and sometimes by neither,” &c.—“ And where  
“ both parties indicate so clearly that it is inju-  
“ rious to them to compel them, it seems unadvis-  
“ able to persevere in a system assuming for its  
“ object the benefit of those who unite in consider-  
“ ing it injurious,” &c.

Now, while this system continued in all cases, and in the cases where it still continues, a detail of the circumstances may be proper so far as they can be got from the parties. But as cases to be tried by Jury must be established by proof, the Condescendence and Answers ought now to be different, as they are never seen by the Jury

who are to decide the case, and the Judge at this stage of the proceedings has nothing to do with whether the case is good or bad—whether the statements are true or false, probable or improbable,—but merely whether the averments, if true, are sufficient to sustain the action or defence. The object formerly was to enable the Judge to form an opinion on the probable truth of the case on the one side or the other ; now it is to give information to the opposite party of the nature of the case to be proved against him, and to prevent surprise.

Under the system followed before the introduction of trial by Jury, to quote again from the same answer to the Commissioners, “ A man of integrity will state the real circumstances of the case ; if the defender happens to be of a different description, he will not make an equally fair counter-statement ; and the only use that will be made of the statement of the pursuer will be, that whatever is unfavourable to him will be admitted, and whatever is favourable to him will be denied. In place, therefore, of the Judges being put in possession of the whole circumstances of both parties, those parts only of the statement unfavourable to the pursuer will be agreed to ; and there may thereby be a sufficient number of admissions to lead the judge to decide the

“ case against the pursuer, while the real circumstances, if a proof had been allowed, might have been very different, and led to an opposite decision.”

Under the former system, the honest litigant, as mentioned in the passage just quoted, states and admits what he knows to be fact, without being aware of the effect this will have on the case, by his less conscientious opponent denying what is fact, or averring what is not true.

Full statements and admissions from each party, if they could be obtained, would be attended with benefit ; but, from the failure which has attended the attempts to obtain them, it may fairly be concluded that it will better forward the attainment of justice to abandon this attempt. If it can be shown to be for the interest of the party to make the statement in a different manner, there is little doubt that he will make it as proposed.

The reason of requiring an admission or denial of all the circumstances was to narrow the case ; but this is merely gathering with the one hand what was scattered with the other, and which, when collected, will not repay the trouble. Were the averments restricted at first to those essential to the case, there would be no necessity for this subsequent narrowing, and it would at once be seen on what point the case turned. In drawing the papers

under the former system, two things must have been attended to,—*First*, to state the facts and circumstances; and, *secondly*, to state these in such a manner as to satisfy the reader (the Judge) that the facts were probably true, and that the case was good. It will require time to correct, and to bring the profession to see distinctly the difference of the statements required under the new system. Some improvement has undoubtedly been made; but it will require the attention of the Bar to be drawn and kept alive to the subject, to correct a habit established by long practice. Were that attention excited, I have no doubt that in a short time the preparation of cases might be left to the parties instead of being, as at present, the act of the Court. The present mode of proceeding under the superintendence of the Judges, or something analogous to it, must be continued till the Bar becomes aware of the necessity of more accuracy, and till the difference of the systems becomes more familiar; but this would probably be hastened were the Judge allowed time to attend to, and point out, the errors in cases as they occur. When the subject is well understood, it would then become expedient to allow the one party to lay hold of any irrelevant fact stated by the other, and to claim from him on that account a great part of

the expense incurred, or even to turn the case out of Court.

In general, each party knows the circumstances upon which the demand is made, or the defence rested ; and therefore it is not necessary to state more than the facts which are essential to support the action or defence. Should it, however, be thought that it is still essential to state the minute circumstances, to prevent surprise, a marked difference should be drawn between the facts which are essential, and those stated for this last purpose. The facts that are essential to the case,—the general propositions on which the case rests, ought to be averred in a set form of words, each sentence beginning with the word of averment. What is meant is illustrated in the conclusion of these hints, where the word *That* is adopted as the word of averment. The facts so averred must be admitted or denied ; but with respect to the others, the minute circumstances, it is immaterial whether they are denied or admitted, as they ought merely to be looked on as information to the opposite party. This separation, I have no doubt, would tend greatly to simplify the case, when, instead of having, as at present, the whole facts, important or not, thrown together in one mass, the essential part would be brought prominently forward, as the ground upon which the issue and the case was to rest.

In cases to be tried by a Jury, however, the object is, to obtain a clear, short, and distinct statement by each party, of the facts and grounds in law upon which he conceives his case to rest. The facts, it appears to me, might in general be contained in a very few direct averments ; and were a general form drawn out applicable to each species of action, it would be of great use in directing the minds of counsel to what is essential to the case. Instead of a detail of minute circumstances, from which an inference is drawn that the fact must be so, the party ought to aver the fact, and then he will either succeed or not by proving it by the circumstances.

When the essential facts averred are sufficient in law to support the pursuer's demand, then the defender must either deny them, or if he admits them he must state some separate and independent defence. If he denies them, then the case goes to proof, and will be decided according to the evidence adduced. If, on the other hand, the defence is a separate one, the defender ought in the same manner to state the facts essential to his defence, and the pursuer to admit or deny them.

If the party does not deny the essential facts, judgment ought to be pronounced against him ; but, holding a party as confessed, provided he does not deny the unessential circumstances aver-



red, is no longer necessary. Even, under the former system, it was very rarely put in force by any explicit interlocutor ; and, under the system which is now proposed, there is no call for it.

It is not to be expected, that so long as motives exist for continuing the error, merely pointing it out will be sufficient. It is the interest of a party whose case is bad, to attempt to involve it by a long and intricate statement; and, even when the case is good, he cannot always separate what is essential from the circumstances with which it is connected. Besides, agents of an inferior class may have an interest in lengthening the papers. And it may here be suggested, that counsel should endeavour to select the essential facts, and not, because it is easier, state all the facts that are furnished by the agent.

These, and probably many other, obstacles, stand in the way of the improvement contemplated ; but now that the jurisdiction is permanently vested in the Court of Session, were Judges for a short time to be strict in detecting and pointing out the errors,—in not allowing the cases to proceed till they were corrected,—and in giving expenses to be immediately paid where they were persevered in,—there is every reason to suppose that the time would soon arrive when the parties would discover, that, provided they stated sufficient to make out their cases, it was

not only unnecessary, but injurious, to state more as affording the other party the means of subjecting them to expenses, or even of turning them out of Court. Both parties would thus come to find it to be their interest to aver as little irrelevant matter as possible, and the case would be narrowed much more effectually than it can be by any admissions that can be reasonably expected. Besides, it secures fair litigants from any injustice that may arise from admissions incautiously made.

The Judges having for so many years been accustomed to a double mode of stating the facts of a case, and having two papers bearing the name of Condescendence, viz. a Condescendence of the grounds of the action, and a Condescendence of facts without argument, commonly called a Condescendence in terms of the Act of Sederunt,—the Bar having been trained in the same system, it is not wonderful that there should have been a degree of confusion introduced ; and that the Bar should not have acquired the habit of scrupulously avoiding the detail of unimportant facts, or of mixing argument with fact, and that the Judges should not have been very scrupulous in detecting, or rigorous in condemning, the error. Indeed the means of correcting the error where it was committed were so inefficient, that its continuance was not wonderful. The usual mode of expressing disapprobation was

by a note in an interlocutor ; but though the disapprobation was expressed, the erroneous statement remained in process, and was frequently the means of leading the opposite party into a similar error, and probably to a greater degree. No doubt more minute attention has been paid to the subject since the Stat. 4 Geo. IV. c. 120 passed ; and Lords Ordinary have ordered passages to be struck out of Condescendences and Answers. But this has been done with a very sparing hand, and to a very limited extent. Besides, there is an impression prevalent at the Bar, that the Judges differ in opinion as to what ought and ought not to be stated. Whether this opinion is well or ill founded, the effect is the same ; for instead of aiming at one uniform mode of stating a case, the Bar attempt to meet those different, or as they suppose different, views of the Judges ; and it is no unusual apology for what is pointed out as redundant in the pleadings, that it was inserted to meet the views of the Judge who ordered the paper.

A system of pleading applicable to Jury cases ought to be the first thing attended to. The application of a few superior minds to the subject, having power to fix by decisions the principles upon which they act, and having weight with the profession to satisfy them that the decisions are right, would greatly forward this import-

ant branch of our judicial system. Unless some attention is paid to this subject, it is to be feared that by a number of individuals acting independently, great confusion and uncertainty might be the consequence. Till a much greater number of principles are fixed, and there has been much more extensive practice to develope these principles, it is impossible that a uniform and consistent system can be reared up by a number having their attention distracted by other business. This can only be done by one Judge, or a few Judges acting in concert, and having their time and attention devoted to the subject, and considering well every step they take.

It has been already observed, that it would greatly improve the pleadings if business were so arranged that the Judges could give more time and attention to the subject. Were one of the Lords Ordinary for a certain period detached from other business, and to devote his attention exclusively to the subject of pleading, it would be a most useful employment of his time. Uniformity in pleading is of great importance, and it is only by the application of one ruling mind to the subject that uniformity can be attained.

With a view to the improvement of the pleadings, the mind of the profession must also be kept alive to the subject, as those interested in a cause

are always most quick-sighted in discovering what will be injurious to their client, and will, of course, suggest very important matter for the consideration of the Court.

Were it possible to draw out a form containing what it is essential to aver, it would be a great assistance in drawing Condescendences, as it would afford a test to which each fact or circumstance might be brought, to ascertain whether it should or should not be averred. It would no doubt be difficult in the present state of pleading to draw out such forms, but still an attempt at it would be beneficial. These forms could not at first be enforced as binding, but merely taken as hints or general outlines, according to which cases should be stated, and should themselves be for some time liable to alteration and correction.

The object of the pleadings in a case ought to be, clearly and distinctly to state the averments and pleas of the parties opposed to each other, to state the facts, and aver their truth, in as few and distinct terms as possible,—to state all necessary facts, and no more than are necessary to support the conclusions of the action and the ground of defence,—to make the averments in direct and precise terms, avoiding entirely all matter which goes merely to show the probability of the statement, and then drawing the conclusion, or rather

making the averment, that these facts being true, the conclusion is clear for the pursuer or defender. One great object of pleading ought to be to attain uniformity in so far as consistent with justice. The form of the Summons and Defences ought to be uniform in each species of action ; but at present, so far as appears from the practice, no two legal advisers would draw any one of these papers in the same form from the same information. Take, for instance, an action for recovery of a debt. By some this case would be brought into Court on a Summons in a few lines, stating the nature of the demand, and that, as the defender refuses, therefore, he ought to be compelled to pay, with interest and expenses.

Another from the same materials would state a variety of minute circumstances in the conduct of the party, before, at the time, and subsequent to the transaction out of which the debt arose, and the communings of the parties, and demands of payment, and promises, or supposed promises, of the defender to pay. In short, the modes of doing it are as various as the views or interests of the persons drawing the summons may suggest.

In the case supposed, as it is simple, every one will be of opinion that the first is the best mode of stating it ; but it is believed very serious doubts exist, and in very high quarters, as to the propriety

of so general a Summons as is first supposed. Some are of opinion, that, were the Summons reduced to this general form, it would afford pursuers too great facility of bringing unnecessary actions, and thereby oppressing their neighbours; but in answer, it may be suggested that every obstruction to bringing an action is an encouragement to defenders to resist just demands, and it is not easy to see a good reason why the interest of the defender should be preferred to that of the pursuer. If it is an evil that a pursuer should have it in his power, at the least possible expense and trouble, to make good his just claim,—if it is thought the danger is too great of pursuers voluntarily and unnecessarily subjecting themselves to the trouble and vexation of a law-suit, a remedy for the evil, if it is an evil, might easily be devised. But without at present entering into the question whether these doubts are well founded or not, though it is difficult to believe that they are, the attempt now made is to point out and enforce the importance of uniformity in pleading, and that, if the short Summons is good, it ought in all cases to be adopted, and if it is bad, it ought in no case to be allowed. The answer might perhaps be suggested, that it may be good in a simple case, but not in one more complicated. It appears, on the contrary, that, in proportion as the case is complicated, the Sum-

mons ought, if possible, to be simple, as in that case it is certain that a Condescendence will be required, whereas in the simple case, had the summons been more detailed, a condescendence might have been unnecessary. But whether the simple or the detailed summons is best fitted to the one or the other case, where is the security that the proper summons will be applied to the proper case? The truth is, the form will depend more on the hands into which the information is put, than on the propriety or impropriety of the form to the particular case. If a mass of confused materials is put into the hands of one man, he will think the summons must be long, whereas if they fall into those of another, he will see through the confusion, and bring the case to a single point. If the materials are given to a man who does not take the trouble to examine them, but trusts them to an inexperienced apprentice, or are put into the hands of one who looks more to his own interest than to that of his client, the statement will in either case be unnecessarily long; in the one, from not knowing what to omit; in the other, from a desire to make the pleading long. In the latter cases, the Summons will be very different from what it would be were it drawn by a person desirous in the clearest manner to state his case, and in the shortest time, and at the least expence, to get justice done to his client.



As it is found by experience that it is not in one case in a hundred, or perhaps in a smaller proportion, that the Summons is held to be the statement of facts on which the Record is closed, there seems little doubt whether a long or short Summons,—whether one giving a long narrative, which is almost never sufficient,—or one stating merely the ground of action, and the conclusion drawn, is to be preferred. Indeed, as a Condescendence is in almost all cases required, it is difficult to discover the use of the detail in the Summons, especially as it may be omitted by the party in the very cases in which the Court wish it to be inserted.

If, however, it is still thought that the Summons ought to contain a statement of the facts, then it ought in all cases to detail them. But if this is the case, it is obvious that the same rules should be applied to a Summons as to a Condescendence ;—the facts ought not to be stated as a narrative, but ought to be averred separately and distinctly, under different articles. The object being to get a full and distinct statement of the facts, there can be no reason why the rules calculated to attain this in a Condescendence ought not also to be applied to a Summons.

The next step is the Defences ; and every thing which has been said as to the Summons is applicable also to the Defence. If the Summons is

general, so ought the Defence ;—if it is detailed, then they ought to be so also ; they ought to admit or deny the averments in the Summons,—to state the pleas upon which the Defence is rested, and aver in clear and direct terms, without argument, the facts in support of these pleas.

After the Defence come the Condescendence, the Answers, the Revised Condescendence, and Revised Answers, and in many cases what is called Re-Revised or Amended Revised papers ; thus, in almost all cases there are three, and in some four, statements of the case of each party. Were we not accustomed to this it would excite surprise ; but the fact is undoubted, that ninety-nine cases in a hundred are stated three times before they go to proof ; and in several cases the ground of action and averment of fact in the Summons is very little varied in the subsequent statements. In some cases, indeed, the last paper is worse than the first ; for instead of being confined to the facts which the pursuer is to prove in support of his action, it frequently details unimportant circumstances in answer to irrelevant matter stated in the Answer.

It is a matter of minute detail, but not unworthy of being mentioned, that much benefit would arise from having corrections made while the subject is fresh in the recollection of the parties, and

that probably pleadings should in general be revised within one or two days, instead of two or three weeks, which is a usual period at present. If this rule were adopted, the correction would be made while the subject was fresh in the recollection of every one, instead of remaining for weeks till remarks made by the Judge are probably forgotten, and when the whole case must be again read—or, what perhaps is worse, the correction be made when the case is only half recollected. This is a species of business which is much more effectually done at Chambers than on the Bench, where the Judge has not the same opportunity of explaining his views, and where parties are less disposed to make reasonable admissions, and take true views of their cases.

Though the object contemplated in the statute and Acts of Sederunt is good, and though many of the means employed for attaining it are also good, it is more than probable that this object, and the best means of attaining it, are not always kept in view. Interlocutors formerly contained not only an order that the party shall state the facts which he undertakes to prove in support of his action or defence, but also that he shall state "all facts and circumstances relative thereto." Now this is surely an encouragement to state irrelevant matter; and, accord-

ingly, some from ignorance, some from inattention, and some from interest, pervert this part of the order, and detail all the unimportant circumstances, which, so far from giving any useful information to the opposite party, or making the ground of action or defence more distinct, only tend to obscure and smother the important facts, and to keep out of view the pleas on which the case really turns.

By what is now stated, it is by no means intended to propose that a party should not have a power of amending his original detail of facts; but at present this amendment is allowed to a most inconvenient extent, and in very few cases the object of the statement is kept in view. What, then, is the object of the detail which is called for? It is plain that the object is to get a clear and distinct statement of the ground of action or the defence, to put the opposite party on his guard as to the case which is to be proved against him. In general, he knows this as well as the party making the statement, but still there is no objection to, but much benefit, in a clear statement of these facts.

If a party has a bond, or bill, or contract, under which a sum of money is due, of what consequence is it to detail all the circumstances which gave rise to the transaction, which resulted in the defender

giving that obligation, or the numerous demands of payment, and subsequent communings which took place as to the payment of the money? If an action is for assault and battery, of what consequence is it to detail all the circumstances which may have given rise to ill-will between the parties, or even the language which was used at the time of the assault? In many cases of this description, any one reading the *Condescence* would suppose the action was for defamation; but on looking back to the *Summons*, he finds that the only conclusion against the defender is for having knocked the pursuer down. Many similar examples might be given; but the above are sufficient to point out the defects in respect to excess in the detail, of the unessential circumstances of a case.

In what follows, an attempt is made clearly and shortly to state what would probably be an improvement in the pleadings; but it will be necessary to go into some detail; and perhaps it may run into the same fault, detailing what is unimportant, which it is wished to correct in others. But in a matter of this sort, to which so little attention has been paid, it is perhaps better to be tedious by minute detail, than to pass over what may appear obvious. Though the detail may be tedious, there is more danger of deficiency than redundancy, as these remarks are rather hints suggesting improve-

ment than any thing like a complete treatise on the subject.

I. THE SUMMONS.—On this subject, some will be of opinion that it is intended to go back to the state of the law and pleading prior to the year 1731, and that the intention is to propose the introduction of a writ similar to the ancient Brieve, and losing all the benefit of the statement of fact in the Summons; but it will not be very difficult to take a middle course between that and what is now frequently practised, and to state generally the nature of the action, without entering into details. On the one hand, avoiding the extreme of making the Summons a mere form, containing only the names of the pursuer and defender, and the time of signeting and of appearance; and, on the other, making it a long narrative of the facts and circumstances previous to, at, and subsequent to, the date of the fact on which the action rests.

It is no doubt difficult to state hypothetically any form which may be practically useful, though in many cases the forms in the Juridical Styles are good. Facts out of which a ground of action arises are so various, that a mere general form containing blanks to be filled up is thought of no use. The following attempt is

made in the different kinds of action, to point out the leading facts from which the pursuer draws the conclusion, that the defender should pay a sum of money, or perform a certain act. In illustrating this, the suggestions shall be confined to the cases enumerated in the Stat. 4. Geo. IV. c. 120, and shall contain what occurs on each of them respectively, as the essential ground of action, and the facts which it may be necessary to state to make the defender aware of the case to be proved against him.

This attempt may not be successful in all the cases; but in many of them it is hoped that it may suggest at least the point which ought to be kept in view; and thus, even if thought wrong as to the form of the Summons, still these skeletons may be of use as fixing the attention on those points upon which the detail of facts ought to bear. The views which are here taken, it will appear, have been suggested in the course of the training the author has undergone in the preparation of Issues, and he is willing that it should be traced to that source, and that those from whom he has derived his ideas on that subject should have the credit of any merit the observations may possess, though he is alone answerable for their deficiencies.

There is no way in which pleading would

be more simplified and improved than by considering at an earlier stage the Issue upon which the case is to be tried. If, instead of considering what the Issue is to be, after a Condescendence has been revised and re-revised, the pursuer, before drawing his Summons, would consider and make out in writing what the question is on which the decision must turn, and would keep this question steadily in view in all his statement of facts and pleas; no one can doubt that much unnecessary detail would be avoided, and the case be better understood and more clearly brought to an issue. The object to be kept in view by the pursuer, is gaining his case, and how that can be accomplished with the least expense, delay and trouble; and provided this can be done by a short and clear statement of the essential facts of the case without injustice to the defender, there is no good reason why he should load his case by a detail of unimportant circumstances. The object of a pursuer ought not to be to try how much of detail he can insert in his summons, but with how little detail he can gain his case, and at the same time give the defender fair warning of the nature of that case. He ought to inform the defender of the nature of the obligation on which the claim is rested, and the time at which the obligation was undertaken or incurred; but having done this, the defender is fully prepared to state his defence.



The Summons then, it is conceived, should contain merely the ground of action and the conclusion drawn from it, leaving for the Condescendence any detail which may be necessary for the information of the opposite party.

Thus, in Assault, the first case mentioned in the Statute, it ought merely to state that, on such a day, at such a place, the defender assaulted and struck the pursuer, leaving for the Condescendence any facts which it may be intended to prove as aggravation or any special damage consequent on the assault.

In Defamation too, the Summons ought merely to state that on such a day, at such a place, and in hearing of such a person, the defender falsely, calumniously, and injuriously said, that the pursuer was a thief, or bankrupt, or whatever may be the calumny.

If the action is for a written or printed Libel, then that the defender wrote, printed, and published, or wrote, or printed, or published, or caused to be written, or printed, or published,—a letter or book, giving the date of the letter or title of the book, containing on the — page a statement, falsely and calumniously accusing the pursuer of perjury, or theft, &c.

If the defender was acting either as a Judge, or Magistrate, or a master giving a character of a

servant, or was in any of those situations where he was bound or entitled to speak of the character of the pursuer, then the Summons must also aver that the accusation was maliciously made.

In an action for Injury to moveables or land, the nature of the injury ought to be stated, with the time and place, and the amount of damage; and that it was done, or caused, by the defender.

For a Breach of Promise, whether of marriage or any other subject,—the promise,—the breach, and the damage are the essentials.

For Seduction or Adultery,—the relation in which the pursuer stands to the person injured, —that the defender seduced the affections of the wife or child of the pursuer, and had carnal knowledge of her person, to the damage, &c.

On the Responsibility of Ship-masters, &c.—that the defender is master or owner of a ship,—a carrier, &c. That the pursuer put, or caused to be put, on board the ship,—or delivered to the carrier,—or brought into the inn so many bales of goods,—a portmanteau or horse, of the value of L. —that the defender failed to deliver the said goods, or restore the horse, &c. and ought to be decerned to pay.

For Nuisance,—that the pursuer is proprietor or tenant of a house in                      Street of  
—that at such a time and place the defender erect-

ed a steam-engine, or a building, and machinery for the purpose of manufacturing ;—that the smoke and vapours issuing from the building are a nuisance to the neighbourhood, and are to the injury and damage of the pursuer L.

Furiosity and Idiocy.—That at the time A. B. subscribed the deed he was furious, or an idiot, and not aware of what he was then doing.

Facility and Lesion.—That at the time A. B. subscribed the deed he was, and had for a considerable time before, been of weak mind, and easily imposed upon,—and that the defender, taking advantage of the facility, did impose upon the said A. B. and by fraud and circumvention did obtain from the said A. B. the said deed.

Or “did impose,” &c. and obtain the said deed, to the enorm lesion of the said A. B.

In cases of this description there is frequently much confusion in the statement. Means should be devised to compel the pursuer distinctly to state the different grounds on which he means to proceed. If he means to plead total incapacity, that should be stated as one ground,—if fraud, that should be distinctly stated as another,—if facility and circumvention, that is a third,—if facility and enorm lesion, that is a fourth. In general these are so united in the narrative, particularly fraud, with facility and circumvention, that it is difficult

to disentangle them, and in some cases the narrative seems applicable to the one ground of reduction, and the conclusion to another.

**Force and Fear.**—That at and before the time when the said A. B. subscribed the said deed, the defender did, by force and threats of personal violence, intimidate the said A. B., and thereby cause him to subscribe the said deed to the injury, &c.

**Insurance.**—That by a policy dated        the defenders agreed to insure to the amount of L. —that the pursuer paid, and defenders received, the premium,—that the goods to the value of L.        were put on board the        on such a day, and were lost,—or the house burned,—or the person dead,—that the pursuer was the owner of the goods, or how he was interested in the life insured.

The same form will apply to Charter-Parties and Bills of Lading, &c.

**Contracts, &c.**—In these the contract, whether to pay or perform, should be stated,—the failure,—the interest of the pursuer, and the damage.

**II. DEFENCES.**—This is the next stage of the pleading.

If the defence is preliminary, it ought to be as short as possible,—that no title is produced,—that there is an action depending before the Court for the same sum, or whatever the defence may be.

A defence on the merits must be either a denial of the charge made, and this in general may be made in a single sentence. Or a confession that the charge once existed, and an averment that, under the circumstances, it is extinguished. In this last case also the defence may be shortly stated ; and here, as in the case of a pursuer, it ought to be the object of a defender not to state all the matter connected with his case, or all the matter which he thinks will give an air of probability to it, or throw a degree of odium on the pursuer for making the demand ; but his object ought to be, in distinct averment, without argument, to state the point of law, and the fact or facts which, if proved, will make out his defence. In this stage of the pleading all detail should be avoided, and the averment ought merely to be such as will put the pursuer on his guard as to the defence he has to meet, and the statement which it is necessary for him to make in his Condescendence.

In the Reports of Jury Court Cases, contained in this and the preceding volumes, what is here proposed has been attempted by the abridgment of the defence in the introductory statement to each case ; and though in many instances the whole defences are not stated, still it is obvious what the nature of the averment ought to be.

Having stated what the Summons ought to con-

tain in the different cases enumerated in the statute, the Defence to each ground of action may now be mentioned.

The defence in assault should be a denial of the assault ; or if the blow is admitted, then an averment ought to be made that the defender, at the time and place, assaulted the pursuer, and that the pursuer acted in self-defence.

In defamation, the defence ought to be a denial of having used the words, or of using them according to the meaning stated. If using the words is admitted, then the plea of *veritas* ought to be stated without detail, but narrating the facts as if the defender were drawing a Summons. All facts merely tending to diminish damages ought to be reserved for the Answers to the Condescendence.

For injury to property the defence is a denial of the alleged act—or of the damage done by the act—or an admission of the act, and an averment of a right to do it.

For Breach of Promise.—That the promise was not made—that it was not broken—that facts (stating the general nature of them) justified the breach—that no damage followed.

Seduction or Adultery.—A denial—or that, from the conduct of the pursuer, he is not entitled to claim.

**Responsibility of Shipmaster, &c.**—A denial that the goods were put on board, or brought into the inn, &c. or an admission of having received them, and an averment that the pursuer took them away, or that they were delivered to B. C. on such a day by direction of the pursuer.

**Nuisance.**—That the effluvia arising from the works are not noxious,—that the manufacture is not a nuisance—that it is not a new erection, and is in a situation appropriated to such works, and is not a nuisance.

**Furiosity and Idiocy.**—A general denial.

**Facility.**—Denial of the facility; and the circumvention—and the lesion, &c.

**Force.**—Denial, &c.

**Insurance.**—That the policy was not granted (query, whether in this case a reduction may not be necessary)—that the vessel was not seaworthy—that she deviated from the voyage insured—that she was not lost—that the goods were not put on board—that they were contraband—that the fire was wilful, or caused through gross negligence—that the life was misrepresented—or material facts, (stating them generally,) were concealed—that the pursuer had no interest in the life, &c.

**Contracts.**—A denial of the contract, or an averment of performance—or a release by the pursuer.

**III. CONDESCENDENCE.**—The next step in the pleading, or perhaps it ought to be called the first step in the pleading, is what is termed a Condescendence. The facts on which cases dépend are so various, that it is difficult, by description, to give an accurate idea of what it ought to be. This, however, is clear, that the point to be proved ought to be averred and steadily kept in view, and that every averment made ought to be in reference to that point. Every thing like argument—every allusion to averments on the other side—every thing which only goes to show that the pursuer is probably right—every thing which goes only to show that the defender is wrong in any thing but the point to be proved—in short, every thing that does not go to prove that the money is due, or the act done from which the claim arises, ought to be scrupulously avoided.

The great object ought to be to reduce the case to one, or as few points as possible; and with this view the nature of the action, and the point on which the case is to turn—**THE ISSUE**—ought to be steadily kept in view.

The author is aware that, in hazarding this opinion, he is venturing on ground which many will think dangerous, and that there are men of the greatest eminence who are not satisfied unless they can convince a Court or Jury that they are right



in every particular. With the highest opinion of their talent, there seems good ground to doubt the reason on which this opinion and practice is founded. If a party succeeds on the main point, it is waste of time to attempt to show that he is right in every minute circumstance, and therefore, if he states the great leading facts of his case, and the means by which he is to prove it, so that there may be no surprise on the part of the defender, it is difficult to see why he should lay his case open to the hazard of failing on other matter, and thus rendering doubtful his success on what ought to have been his only ground of action.

IV. ANSWERS.—The Answers bear the same relation to the Condescendence which the Defences do to the Summons, and ought to contain a denial or admission of the averments in the Condescendence. If any plea is maintained on the points admitted, that ought to be stated. When a defender has occasion to aver facts, the same rule applies as in the case of a Condescendence. But it seems unnecessary to require a confession or denial of the minute circumstances stated by the pursuer. The answer, like the defence, should deny the fact on which the claim is rested, and state the facts which are to be proved in support of the defence ; but the circumstances being stated merely for in-

formation, and to prevent surprise, there is not the same reason why they should be admitted or denied.

V. REVISED CONDESCENDENCE AND ANSWERS.—Here in practice there is probably a greater error than in the original statement. The Revised Condescendence is occasionally an argument on the averments made by the defender in his Answers, and even where it is not, it frequently enters into detail in answer to averments made by the defender in his Answers. This answer by the pursuer, and an admission or denial by him of the averments made by the defender is unnecessary. The purpose now of Answers is to give information of the case to be proved, and the averments by the defender ought to be used by the pursuer as information, to enable him to correct or alter any erroneous averment he has made in this Condescendence, or to adapt them to the case which it now appears is to be brought out against him.

In the same manner, in revising the Answers, the defender ought merely to modify his original Answers, so as to meet the alteration made by the pursuer on his Condescendence.

These alterations ought to be made on the margin of the original papers, unless the defender in

his Answers, or the pursuer in his Revised Condescendence, brings forward some totally new statement. New statements brought forward at this stage ought only to be admitted on his withdrawing from process his former paper, and paying the opposite party *at the time* the expense of his Condescendence or Answers, which have been rendered useless by that change of statement.

VI. ISSUE.—This is the last step in the pleadings, and though it may, perhaps, be expected that some detail should be given on this subject, it appears unnecessary; for were the Summons and Defences, the Condescendence and Answers such as above described, the Issue would in most cases be obvious.

The Issues at first were what have been termed Issues of Specific Facts, and these were intended to point out the facts which the party must prove before the Court of Session could draw a conclusion in his favour. A great change has since taken place in the nature of the Issues sent to trial, and considerable progress has been made in framing general Issues applicable to most cases which occur. These Issues, instead of putting the question on the specific facts, put a general question, under or in proof of which the specific facts may all be put in evidence, or if several points arise in a cause,

then a general issue is framed applicable to each point.

One obvious cause of the progress made in this branch of the pleadings has been the undivided attention of a few minds to the subject; but the case is very different with the other branches of the pleadings. These are necessarily the work of many different persons occupied in the business of the Court of Session.

The alteration proposed in the pleadings would greatly accelerate the improvement of Issues. It would bring the real substance of the case so much more into view, and would free it so completely from those circumstances which distract the attention, that there would be a much smaller effort of abstraction necessary to get at the general principle or issue upon which the case turned.

It has been an object of attention to frame general Issues applicable to each species of action, and in many cases they have been adopted and proved beneficial; but till Condescendences and Answers are much improved, and more accuracy is introduced into them, the General Issue, instead of a benefit, may in some cases prove dangerous. But when so improved, the General Issue will then be applied to all with advantage. That the Issue is an essential part of the pleading every one will admit,—indeed it seems so

essential that it should form the foundation of the whole. It ought to be a question including the general proposition on which the action or defence rests, and should, therefore, be kept constantly in the view of the counsel who draws, and of the Judge who corrects, the other pleadings.

It ought to be a question, the answer to which will decide the dispute between the parties, and under which all facts relevant to support the conclusion of the action may be proved. Thus, in assault what is suggested as the Summons would form the Issue. In defamation, there has, perhaps, in practice, been a deviation from the principle of a general issue; but the expediency of having before the Jury, in the printed Issue, the words relied on, has been thought to warrant this deviation. What has been given as the Issue in cases of this sort seems rather matter proper for the Condescendence; and it may be doubted whether the reason assigned, the propriety of having the specific words before the Jury, is sufficient to warrant the deviation from the general rule.

In the other enumerated cases, several of the points necessary to be stated in the Summons will generally be admitted; but if not, they must be put in issue by converting the averment in the summons into a question.

From what is already stated, the issue in the

different actions will be obvious. If the Summons is stated as a question, it will be the issue for the pursuer, and in the case of a special defence, that defence will be the issue for the defender.

In presenting to the profession Reports of the last Cases tried in the Jury Court, and closing his labours as a reporter, the author would, as he did in commencing them, return "his thanks to "the Profession in all its branches, for the uniform civility and attention with which they "have afforded him necessary information;" and certainly, if he had then cause to acknowledge the attention and encouragement of the Judges, he has now still stronger reason for expressing his gratitude to them, and especially to the eminent person who presided in the Jury Court. It is not easy to find words to convey what he feels as to him, and perhaps this is not a fit occasion for enlarging on that topic. But he cannot refrain from stating his admiration of those talents by which that venerable Judge has been enabled to introduce the system of Trial by Jury in Civil causes into Scotland, and to overcome the prejudice which existed against it; nor can he avoid mentioning the constant and anxious attention with which he watched, and still watches, over every effort (even the feeblest) to improve that system.

In an Appendix to the first volume of Reports

the Condescendences and Answers in three cases were given, to show the materials from which the Issues were drawn. The progress which has since taken place in the improvement of Condescendences, Answers, and Issues, is such as to remove all indelicacy in observing on these statements, and in the attempt here made to shorten them. There is no better method of illustrating the views stated above, than by referring to these cases already in the hands of the profession, and showing how these pleadings ought to have been drawn, with a view to trial by a Jury. These were drawn with no such view, and it may be thought presumptuous to criticise statements, or to suggest what would have been an improvement; still I shall venture to shorten, and I hope simplify, these statements, while nothing material is omitted. It would require a person habituated to draw pleadings to do so with accuracy; but the attempt is here made, and even if it should prove a failure, it will show better than any general description what is recommended to those who are more able to put in practice what would be a great improvement.

The first of these cases is one of nuisance, and in it the Condescendence is less objectionable than in the others, but still it might have been considerably shortened, without leaving out any essential part. The following is an attempt to shorten it

in the manner proposed. In the last of these cases mutual Condescendence and Answers were ordered, which is a very inconvenient form in cases which are to be tried by Jury. It is doubtful whether what is stated in this case, is in all respects what is meant by the party, but it serves equally well for the purpose for which it is brought forward.

Having hazarded these remarks, it only remains to state the pleadings to which reference has been made.

#### RAEBURN *v.* KEDSLIE.

##### CONDESCENDENCE FOR RAEBURN.

*1st*, That in the beginning of summer 1814, in the village of Stockbridge, one Kedslie erected a steam-engine, which is now the property of the defenders.

*2d*, That the pursuers are proprietors of houses, and lands, and gardens in the neighbourhood of the said engine.

*3d*, That smoke and other gases which issue from the said engine enter the said houses and gardens, and are injurious to the health of the inhabitants, and destroy the furniture in the houses, and vegetables in the gardens, and is thereby a nuisance.



4<sup>th</sup>, That the said property of the pursuers is included in a plan of the New Town of Edinburgh, part of which has been executed, and handsome dwelling-houses erected, and the said gases are injurious, and a nuisance to the inhabitants of these houses, and prevent other persons from becoming feuars of the said property of the pursuers.

ANSWERS FOR SAUNDERS, Defender.

1. Admitted.

2. Admitted.

3. Denied that the said engine is a nuisance, or that the smoke and vapours issuing from it are injurious to the health of the inhabitants of, or to the furniture in the houses, the property of the pursuers, and vegetables in the said gardens.

4. Denied that the said engine is a nuisance, or that the said smoke and vapours are injurious to the said houses, forming part of the New Town of Edinburgh, or have been the cause why the said lands of the pursuers, included within the said plan, have not been feued.

Averments for the defenders.

That the said steam-engine is of the most approved construction, and has an apparatus for consuming the smoke, and though at first it emitted a good deal of smoke, now the smoke and other vapours do not exceed that of a common kitchen chimney.

There are ovens, smiths' shops, yarn-boiling, and other manufactures, in the immediate neighbourhood, each of which emit more smoke than the defender's engine.

Ground, within a few yards of the engine was about the      day of      feued at the high rate of 5s. per foot.

One of the pursuers on the      day of got a premium from a horticultural society for flowers reared in one of the said gardens.

#### ISSUE.

The Issue in this case would now probably contain admissions that the engine was erected—that the pursuer had property in the neighbourhood—and the question would be, whether the smoke and vapours from the engine were and are to the nuisance of the pursuers or any of them, and to their injury and damage? \*

PAUL *v.* OLD SHIPPING CO.

#### CONDESCENDENCE FOR PAUL.

##### 1. That Messrs Robert and John Hewetson,

\* The Issues for the pursuers in *Arrot v. Whyte*, and *Hart v. Taylor*, at p. 151 and 307 of the fourth volume of these Reports, have been approved by the highest authority on this subject in Scotland, it may therefore seem presumptuous even to suggest that any thing there inserted ought to be omitted, but even in those cases there is a little redundancy.

merchants in London, as agents for the pursuer, purchased 100 barrels of Riga sowing flax seed, and on the 27th day of April 1814, delivered it at the wharf on the river Thames occupied by the defenders, to be immediately transmitted to Leith.

2. That the defenders put the seed on board the smack called the Lord Melville, and promised that the said smack, containing the said seed, should sail for Leith on Friday the 29th day of the said month.

3. That the said smack was then under arrest, (which was concealed from the said Messrs Hewetson,) and did not sail from London until about the 6th day of May following, and did not arrive at Leith until the 15th day of the said month of May.\*

4. That after the said seed was delivered to the defenders as aforesaid, the Queen Charlotte and other smacks sailed from London for Leith on the 28th and 30th days of April and 1st day of May, and arrived at Leith on the 3d, 4th, and 5th days of May.

5. That, trusting to the said promise, that the vessel containing the said seed should sail from London on the 29th day of April aforesaid, the pursuer, on the 6th day of May, sold to Mr John Baillie, merchant, Airdrie, for the sum of L. 500

\* Probably part of this and article second ought to be omitted.

Sterling, the said seed, to be delivered at Leith on the 9th day of May aforesaid.

6. That the said seed not having arrived on the said 9th day of May, the said John Baillie refused to receive the same or to pay the said price.

7. That the said seed was, by agreement of the pursuer and defenders, subsequently sold at Dundee by Mr Anderson for the sum of L. 227, 9s. 6d. being a loss of L. 272, 10s. 6d. caused by the aforesaid delay on the part of the defenders.

#### ANSWERS FOR BLACK, Defender.

1. Admitted that the seed was delivered to Mr Lawrie, the manager for the defenders in London,

2. Admitted that the seed was put on board the smack the Lord Melville on the 27th April, but denied that he promised that the said smack should sail on the 29th day of the said month.

3. Admitted that the said smack was then under detention by the custom-house officers, and did not sail from London until the 6th day of May, and did not arrive at Leith until the 15th.

4. Denied that the Queen Charlotte sailed from London before the 6th day of May, but admitted that other smacks did.

5. The defenders know nothing of the accuracy of the statement in this article,—it is therefore in point of form denied.

6. Admitted that the seed was sold for the sum of L. 227, 9s. 6d. but denied that the defenders are liable in payment of L. 272, 10s. 6d. or in any loss that may have been suffered by the pursuer on the purchase and sale of the said seed.

## ISSUE.

The Issue in this case would now probably contain admissions that certain flax seed, the property of the pursuer, was on the 27th day of April 1814 delivered to the defenders to be transmitted from London to Leith.

Whether the defenders, by themselves, or their manager in London, promised—undertook—agreed—that the said seed should be immediately transmitted to Leith, and whether they wrongfully failed, to the loss, &c.

MANUEL. *v.* FRASER.

## CONDESCENDENCE FOR MANUEL.

1. That in the year 1809, the pursuer was indebted to James Baillie of Fallahill the sum of L. 20 Sterling, contained in a bill of exchange for that sum payable on the 9th day of March 1809.

2. That by the advice of the defender, the pursuer, on the        day of        presented a bill of suspension of a threatened charge on the said bill, and on the 1st day of May 1809, transmitted

to the defender the sum of L. 20 Sterling, to be consigned in the said suspension.

3. That on the       day of       the said James Baillie agreed to accept of the sum of L. 10, 7s. 8d. as payment of the bill last aforesaid, and delivered up to the defender the diligence raised on the said bill.

4. That on the 5th day of November 1811, the defender caused Archibald Watson, a messenger-at-arms, to arrest the pursuer on the said diligence at his father's house at Muirhead, and convey him as a prisoner from thence three miles cross the country to West Craigs, and from thence on the top of a stage coach to Edinburgh, and to the house of the defender.

5. That, by directions of the defender, the pursuer was detained as a prisoner until the following day, and was not liberated until he granted a letter binding himself to appear again on the 8th day of the said month.

6. That at the time the pursuer was apprehended and detained as aforesaid, his cart was loaded with iron, with which he promised to the said Archibald Watson to proceed to Edinburgh on the 6th day of the said month, but this offer was rejected.

7. That the public manner in which the pursuer was apprehended and detained as aforesaid, has ruined his character and credit.

## ANSWERS FOR FRASER.

1. and 2. Admitted.

3. Admitted that the defender paid to the said J. B. the said sum of L. 20, under deduction of L. 9, 12s. 4d. of expences, and that he got an assignation of the bank bond in favour of the pursuer, and that the diligence on the bill was delivered up to the defender.

4. Denied. The facts are stated in the Condescendence for the defender.

5. Denied that the pursuer was detained by directions from the defender.

6. The defender knows nothing of the accuracy of the statement in this article,—it is therefore in point of form denied.

7. Denied that the defender is liable in damages, or that any were sustained by directions given by him.

## CONDESCENDENCE FOR FRASER.

1. That the pursuer became an obligant in certain bills to James Baillie of Fallahill, to relieve him of part of the sum of L.                      paid by the said J. B. to Sir W. Forbes and Co. on behalf of the pursuer's brother John; and that the pursuer's father, along with one Dunlop, was also cautioner in another credit for his son John.

2. That after becoming cautioner, as aforesaid,

the father, by a private deed, conveyed his whole property to the pursuer, and another of his sons.

3. That the pursuer granted certain bills, which Mr Baillie agreed to receive, in implement of the said obligation, by the pursuer and his father.

4. That the defender was employed by the pursuer, as agent in certain transactions, relative to the payment of the last of the said bills granted by the pursuer, and also to suspend a charge given to his father, on a bill relative to the transaction with the said Dunlop.

5. That the pursuer did not deny his liability for the expense incurred in the Suspensions ; and the defender, on the 11th day of November 1809, and again on the 22d day of December, furnished to the pursuer accounts stating the expense incurred in the said Suspensions, amounting to the sum of L. 5, 4s. 5d., and after a settlement with the said J. Baillie, a final account was furnished 18th June 1811, in which the sum due by the pursuer was L. 19, 8s. 1d. for payment of which account, and the expense of process, the defender obtained decree in an action raised against the pursuer in autumn 1816.

6. That in Autumn 1811, the defender requested Mr Archibald Watson, when he had occasion to be in the neighbourhood of the pursuer's residence, to endeavour to obtain payment, or to get



a bill for the amount of this account, and with this view he put into his hands the documents of debt, but gave no instructions to apprehend the pursuer.

7. That on the 5th November 1811, when the said A. W. requested payment, the pursuer objected to certain articles of the account, but said he had business in Edinburgh, and offered to accompany him there, which he did on the 5th November 1811.

8. That on the following morning the pursuer called on the defender alone, and not as a prisoner, and after discussion, agreed to pay the account, provided his brother John was satisfied that it was correct, but instead of doing so, he sent an open note, stating that he would call on Friday and settle it.

#### ANSWERS for JAMES MANUEL.

1. Admitted that the pursuer was obligant in the Bills. Also admitted that the pursuer's father and Dunlop were cautioners in another transaction; but with this the pursuer had no concern.

2. This article ought to be denied, or admitted and explained.

3. Admitted that the pursuer put into the defender's hands L. 20, to be consigned in a suspension of a charge given upon one of them.

4. Admitted that the defender was employed to present the suspension of the charge by Mr Bail-

lie, but denied that the pursuer employed the defender in the other business.

5. Admitted that the accounts were transmitted, but denied that the pursuer admitted his liability for the amount, except to the extent of L.2, being half the expense of the assignation of the bond paid by the said J. Baillie.

6. The instructions given by the defender to Mr Watson are irrelevant, and, in point of form, the pursuer denies them.

7. Denied that the pursuer went voluntarily to Edinburgh with Mr Watson on the 5th November 1811.

8. Denied. The facts are stated in the Condescendence for the pursuer.

#### ISSUE.

The Issues would now probably be, Whether at Muirhead, on or before the 5th day of November 1811, the defender wrongfully apprehended the pursuer, or wrongfully caused him to be apprehended, by virtue of the caption No. of process, to the loss, injury, and damage of the pursuer ?

Whether, on or about the said 5th day of November, the defender, by virtue of the said caption, wrongfully caused the pursuer to be conveyed in custody of a messenger from Muirhead aforesaid, to Edinburgh, and to be there detained in custody of a messenger, to the loss, &c. ?

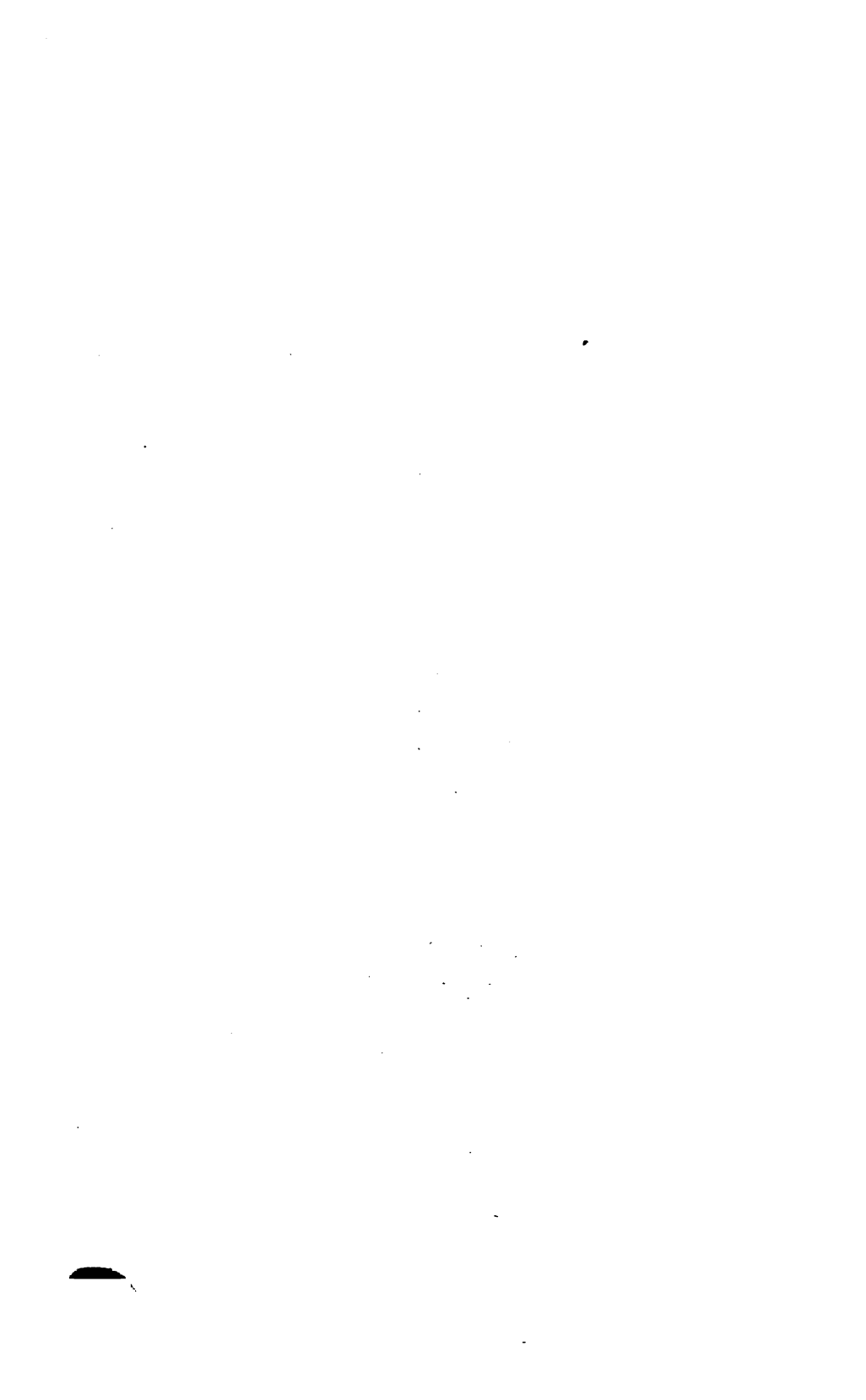
**LORDS COMMISSIONERS**  
**OF THE**  
**JURY COURT,**  
**DURING THE PERIOD OF THESE REPORTS.**

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**The Right Honourable**  
**WILLIAM ADAM, Lord Chief Commissioner.**  
**DAVID MONYPENNY, Lord Pitmilley.**  
**ADAM GILLIES, Lord Gillies.**  
**JAMES WOLFE MURRAY, Lord Cringletie.**  
**J. H. MACKENZIE, Lord Mackenzie.**

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**FRANCIS JEFFREY, *Dean of Faculty.***  
**SIR WILLIAM RAE, Bart. *Lord Advocate.***  
**JOHN HOPE, *Solicitor-General.***



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**THE JURY COURT.**

==  
**GLASGOW.**  
**PRESENT,**  
**LORD CHIEF COMMISSIONER.**  
==

**WILSON, &c. v. WILSON.**

1828.

Nov. 4.

**AN** action to recover the balance of an account due by one Mason, on the ground that the defender had introduced him to the pursuers, and had failed to recover from him the sum claimed.

Finding for the defender on a question of guarantee and negligence in delivering and recovering the price of goods transmitted to him for sale.

**DEFENCE.**—The defender did not guarantee the payment. He was not agent for the pursuers, and acted as he would have done for himself. Mason consigned coffee to the pursuers, which, if sold on its arrival, would have paid the sum due.

WILSON, &amp;c.

v.  
WILSON.

## ISSUES.

“ It being admitted, that in the month of  
“ December 1813, the pursuers transmitted  
“ to Jamaica, certain goods and furnishings or-  
“ dered by Richard Mason, residing at York-  
“ Valley, in the said Island ; and in the month  
“ of October 1814, certain other goods and  
“ furnishings, also ordered by the said Richard  
“ Mason :

“ It being also admitted, that the said Ri-  
“ chard Mason transmitted to the pursuers cer-  
“ tain quantities of coffee, viz.—in the month  
“ of April 1814, 18 tierces in the Perthshire ;  
“ in the month of May 1815, 20 tierces in the  
“ ship Lincoln, and three tierces in the Ber-  
“ lin ; and in the month of June 1815, 17  
“ tierces in the Marquis of Wellington,—the  
“ proceeds of which were to be applied in pay-  
“ ment of the goods aforesaid :

“ It being also admitted, that in the year  
“ 1819, the said Richard Mason died insol-  
“ vent :—

“ Whether the defender guaranteed to the  
“ pursuers the payment of the price of the said  
“ goods transmitted in December 1813, and  
“ is indebted to the pursuers in any, and what  
“ sum, as the said price, or part thereof ?

“ Whether the said goods, sent out in Oc-



“tober 1814, were transmitted to the defender; and whether the defender became, and is indebted to the pursuers in any, and what sum, as the price of the said goods, or part thereof?

“Whether the defender promised and agreed to recover from the said Richard Mason, the price of both or either of the said parcels of goods; and whether the defender failed to recover the said price, to the damage and injury of the pursuers?”

*Hope, Sol.-Gen.* opened the case for the pursuers, and said, This is a case of guarantee, and of undertaking on mercantile correspondence, and of gross negligence in fulfilling it. The defender clearly was agent, and was not entitled to deviate from his instructions. We do not admit acquiescence in the deviation.

*Jeffrey*, for the defender, denied the guarantee, as the only promise was, that a certain quantity of coffee should be sent, and nearly double the quantity was sent. The defender did all he was bound to do for recovering the money, by getting Mason to confess judgment for the amount.

WILSON, &c.  
v.  
WILSON.  
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*Jaffray v. Boag*,  
Dec. 7, 1824.  
3 Sh. and Dun.  
375.

Tidd, 593.

LORD CHIEF COMMISSIONER.—This case

WILSON, &amp;c.

v.  
WILSON.

comes before us in peculiar circumstances, as it had been for a considerable time in the Court of Session ; and it was there decided that the parties must abide by the evidence then in process, which makes it a case depending entirely on written documents, which is not natural to such a tribunal as this. I am uncertain whether you feel, but I certainly do, the disadvantage of bringing forward a case of this sort in this manner, when there is not an opportunity of repeated perusal of the letters ; but if I err on this occasion, the subject may be brought again before me in Session, when there will be time for deliberate consideration of the letters.

If the first question were a pure question of guarantee, it would not require the interposition of a jury to tell the Court the construction to be put upon it—but here it is to be drawn from a train of correspondence ; and the question is, Whether it is a guarantee or recommendation ? Were this brought neatly before me for an opinion in law, I should be disposed to say, on the terms of the letters, that they amounted to a guarantee. But you are to consider whether they are so, or merely a recommendation. If you are of opinion that it is a guarantee, you must next consider whether the terms of the

undertaking were fulfilled, and if so, find for the defenders.

WILSON, &c.  
v.  
WILSON.  


The second issue contains a question of fact, and then the question of liability. The goods, for the price of which the action is brought, were sent by the pursuers at Mason's request, but the bill of lading was sent to the defender ; and it is contended, that, by receiving the bill, he received the goods, and is liable for the price. It appears that the goods were intended for Mason ; and the question is, Whether there was sufficient caution in delivering them ? Whether the defender is indebted depends, under this issue, on the series of transactions.

The third issue is added, in case the pursuers have failed on the two first ; and the question is, Whether the defender failed in getting good security, or doing diligently what was necessary to recover this money ? If the defender had been an agent charging commission, he might have been liable ; but in this case slight negligence is not sufficient ; but to render him liable, there must be gross negligence, which is fraud. It appears that he took steps to get a confession of judgment, which would have been a security upon which the person or property might have been taken. But it does not appear distinctly what he did in following this

OSWALD, &c.  
v.  
LAWRIE, &c.

out ; and from 1817 to 1819 he appears to have done nothing. Was this acting like a prudent man ? But if you think there was not culpable negligence, you must find for the defender.

Verdict—" For the defender on all the issues."

*Hope, Sol.-Gen. and Buchanan, for the Pursuers.*

*Jeffrey and Hunter, for the Defender.*

(Agents, *Hugh Macqueen, w. s., Gibson and Hector, w. s.*)

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GLASGOW.

PRESENT,

LORD CHIEF COMMISSIONER.

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1828.  
Nov. 5 and 6.

OSWALD, &c. v. LAWRIE, &c.

Finding that a public road existed for time immemorial, and that it had been obstructed by a gate erected by the defenders.

THIS was a declarator by a committee of road trustees under a Statute Labour Act, to have it found that a public road had existed for more than forty years,—that it had been obstructed by certain buildings and a gate,—and that the gate should be removed.

DEFENCE.—There are other open streets parallel to the one in question. The ground

was enclosed for more than forty years, except as to foot-passengers, and they and horses are still allowed to pass.

OSWALD, &amp;c.

v.

LAWRIE, &amp;c.

## ISSUE.

“ Whether, for time immemorial, or for forty  
“ years and upwards, there has existed a public  
“ road or highway for carriages and horses  
“ along the south bank of the river Clyde,  
“ from the south end of the Old Bridge lead-  
“ ing from Glasgow to Gorbals to the south  
“ end of the New or Broomielaw Bridge, be-  
“ tween the houses in Carlton Place and the  
“ said river, or nearly so? And whether the  
“ defenders have wrongfully and unwarrantably  
“ shut up or obstructed the said road by placing  
“ a gate across the same, at or near the south  
“ end of the said New Bridge?”

*Jeffrey* opened the case for the pursuers.—  
It is now admitted that prior to 1754, a road  
did exist; but it is said it was shut up, and that  
the one which now exists along Carlton Place  
is a private road, on which the defenders are  
entitled to prevent carts and heavy carriages  
from travelling. The defenders are bound to  
prove this singular sort of right, though the  
issue seems to lay on the pursuers the burden

OSWALD, &c.  
v.  
LAWRIE, &c.

of making out the right to a road. The defenders can only show their right by proving that they purchased it from the trustees, or that they have had peaceable and uninterrupted possession for forty years.

Books delivered to the clerk of an hospital by his predecessor, as containing the minutes of the managers, received in evidence, though not signed.

Certain books of an hospital being produced by the clerk or treasurer of the hospital, an objection was taken, that the minutes were not signed, and that certain of the books were amissing.

LORD CHIEF COMMISSIONER.—The objection taken is not that these books are not sufficient to prove the fact, but that they are not signed. I know no law requiring that they should be signed. The only question is, Whether they are the minutes of the managers of the hospital? and as they were given to this witness as such at the time he came into office, I am of opinion that we must receive them.

A witness may refresh his memory by looking at notes made by him at the time a fact occurred.

A witness having stated that he made a scroll at the time the plan of Carlton Place was made, his Lordship observed, That it was clear a person could not speak from notes made by him at a distance of time, but that it was equally clear, that, if they were made at the time, the witness might look at them to refresh his memory.

*Moncreiff, D. F.* opened for the defenders.—The question is, Whether a road has existed during the last forty years, and not whether it formerly existed? If the pursuers succeed, they must indemnify the defenders, who paid for every inch of the ground. The road which formerly existed was changed under the authority of a statute, and was in fact shut up, though we cannot show any written order for it, as the pursuers have not produced their books. But it is said the road was revived, and that the feuar was bound to make a street; but the question here is not on the contracts of parties, but whether there was in fact a road? The question is peaceable possession of a road down to 1805, when it is clear that they were stopped.

OSWALD, &amp;c.

v.  
LAWRIE, &c.

Nov. 6.

When a plan was produced,

*Cockburn* objects, No plan ought to be received without evidence of its authenticity; and though the haver is of opinion that this is an original plan, it clearly is not, but a copy, as the docquets are all written by one hand, and there is no evidence of its accuracy.

*Murray*.—There were three proprietors of the ground; and we say this is the copy given to one of these proprietors; and we have done

A copy of a plan referred to in a writing, received as *prima facie* evidence in explanation of the writing.

OSWALD, &c.  
v.  
LAWRIE, &c.  


what we could to produce the signed copy, but failed.

**LORD CHIEF COMMISSIONER.**—The person who produces this is the custodier, not the maker of the plan. I consider plans as a species of evidence to be received with great caution, and when received, we must have them in such a state that they may be compared with the thing, and be capable of being confirmed as correct. But where a document refers to a plan, it is in a different situation, and this is given in, not as an accurate plan of the ground, but as explaining the document. The question is not whether this plan agrees with the direction of the road, but whether it agrees with the document, and as in this case there were three proprietors, each entitled to a plan, and as the original cannot be found, I hold this *prima facie* evidence as a means of explaining the document.

A feuor of ground on the side of a street, rejected as a witness in a question as to an obstruction in the street.

Depositions taken many years before in a question between the same parties, received in evidence.

One of the feuors of the defender was called as a witness, but rejected on the ground of interest.

Evidence had been taken in 1804 in a question between the parties. When the depositions taken in that question were tendered,



*Hope, Sol.-Gen.*—The case of Knowles at Aberdeen is the only one in which this has been done, and there the depositions were admitted with great difficulty.

OSWALD, &c.

v.

LAWRIE, &c.


Smith v.  
Knowles, 3  
Mur. Rep. 430.

LORD CHIEF COMMISSIONER.—I do not say that it may be right in all cases to admit evidence taken in this manner, but when I find that after much consideration Lord Pitmilley received it in the only case in which the question occurred, I hold myself bound by that decision.

*Hope, Sol.-Gen.* in reply.—The question here is not whether the pursuers have established a right to a road, or whether this was a statute labour road, but whether the whole public have acquiesced in the interruption of what is admitted to have been a road? This admission throws on the defenders the burden of proving that it was shut up, and in this they have completely failed. The use of this as a footpath by the public was sufficient to prevent the acquisition of it as private property, and there is no authority given by the statute to shut it up, and no evidence that it was shut up.

LORD CHIEF COMMISSIONER.—I am in great

OSWALD, &c.  
v.  
LAWRIE, &c.



hopes that the ends of justice may be attained in this important case by stating within reasonable compass the grounds on which you are to decide it. Indeed, after attending to it for nearly twenty-eight hours, I am not able to go much into detail, and my judgment is satisfied that it is unnecessary.

This is an anxious case for any jury, and particularly so for one in this city ; but I shall not, and you ought not to, go out of the issue, but to draw your conclusions from the evidence for the pursuer or defender.

The question is, Whether immemorially (and forty years is equivalent to this) there has been a high-way along the south bank of the River Clyde? In a high-way there must be a point from which it commences, and one at which it ends ; and though the new bridge did not exist at the time to which part of the evidence relates, we may take the margin of the river at the end of this bridge as the point meant in the issue ; and the margin of a river is a point in which a high-way may legally end. It is, however, of importance in considering the evidence, that the renewal of the use of this road arose from a work of art, which fixed the point on the margin of the river.

It is clear that down to 1756 there was a

road by a coal quay and windmill on the margin of the river to the bridge of Renfrew ; and the question is, Whether this road was legally put an end to in whole or in part ?—Whether it was lost by some operation of law, or such want of use or continued acts of interruption as cuts off the right of the public ?

There is power given by the acts of Parliament to widen or change the situation of certain roads, but there is no specific evidence that this road was so altered, or that another was substituted for it. The question then comes, Whether there is evidence of continued interruption ? The minutes of the trustees at the period being lost, evidence was laid before you of the pulling down a bridge and other acts of interruption, proving that the road to Renfrew could not exist throughout its whole length ; and the inference drawn from this is, that, had the minutes been produced, they would have proved that the whole road was legally shut up. I cannot take this as evidence of the contents of the minutes ; but it proves shutting up in point of fact, by persons looking after the roads ; and this being acquiesced in, the road cannot now be maintained as a road from end to end ; but that evidence does not apply to the part now in question, as these interruptions

OSWALD, &amp;c.

v.  
LAWRIE, &c.

OSWALD, &amp;c.

v.  
LAWRIE, &c.


did not obstruct the road between the old bridge and the coal quay or windmill, which are below the new bridge; and if the road below the new bridge was taken away, it was only for eleven years, as it was again used when the new bridge was opened. This is not the sort of interruption which will take away the right to a road.

There are thirty-three years from the opening of the new bridge to the putting up of the gate between the two bridges; and this is a singular species of interruption, as it was only carts and heavy carriages which were stopped; and there is no evidence of their being stopped before six o'clock in the morning. This is an interruption of the road *via facti* to a certain extent; but it is proved that all carriages, except loaded carts, were allowed to pass.

Much was said of the burden of proof, and, in my opinion, it lies on both parties, and that the defender is bound to defeat the evidence for the pursuer, as he has not proved a legal shutting up of the road. The witnesses for the pursuers spoke to acts done by themselves in using the road, and it is not necessary that it should have the appearance of a made road. Unless they are perjured, they speak to facts

showing the use of this as a road, and you will judge whether there was a want of honesty in them.

OSWALD, &c.  
v.  
LAWRIE, &c.



The witnesses for the defenders speak to observation on the state of this road, and they had means of observing it, but they do not speak to acts done by themselves, and I am unwilling to impute perjury to them. The evidence of many of them goes to prove that there was not any thing like a cart road at that place, but some of them state most material evidence for the pursuers, particularly that singularly distinct witness, who, at the age of ninety-two, gave such proof of being in possession of all his faculties. He proved on his cross-examination, the occupation of this road by carts passing from both ends, and going to certain points, being beyond each other, which shows that they must have crossed each other. The statement by the other witnesses for the defenders, that they did not see carts, is negative evidence, but part of it, as to the breadth of the road, is positive, and, on the whole, the case is a singular one. It rests with you ; for it depends on your opinion of the witnesses, as I am not aware of any thing in the law of Scotland requiring you to find specially that carriages of luxury were allowed to pass, while

DUNLOP,  
v.  
BUCHANAN, &c.

carts were prevented. The passing of the former is evidence of the use of the road.

Verdict—"For the pursuers."

*Hope, Sol.-Gen. Jeffrey and Cockburn, for the pursuers.*  
*Moncreiff, D. F. J. A. Murray, and Ivory, for the defenders.*  
(Agents, *D. Fisher, and Gibson-Craigs, and Wardlaw.*)

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PRESENT,

LORD CHIEF COMMISSIONER.

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1828.  
Nov. 7.

DUNLOP v. BUCHANAN, &c.

Damages against a party, his mandatory, and agent, for arresting the person, and poinding the property, of a protected and discharged bankrupt.

AN action of damages by a discharged bankrupt against one of his creditors and the agent and mandatory, for arresting his person, while he had a protection from the Court of Session; and for again arresting him and poinding his property after he obtained his discharge.

DEFENCE.—The defender, Buchanan, was not aware of the existence of the protection, and the pursuer refused to show it. He gave no authority for the second arrest, but both it and the poinding were justified by the illegal manner in which the discharge was obtained.

## ISSUES.

The issues contained an admission that the pursuer's property was sequestrated,—that he obtained a protection,—and that the defender Buchanan, was a creditor, and held a horning and caption against him. The questions then were, Whether the pursuer was lawfully discharged of debts contracted by him prior to a certain date? Whether the defenders, or any of them, in July 1827, wrongously put in force the caption, and caused the pursuer to be apprehended, and detained? and Whether Buchanan, in November, caused him to be apprehended, and his goods to be poulded?

DUNLOP  
v.  
BUCHANAN, &c.

When the case was called on for trial, it was stated by the pursuer, before the jury were sworn, that by a clerical error in the issue, the year 1827 was twice inserted instead of 1826. As the defenders stated no objection, though they did not expressly consent, the Court made the correction.

A clerical error in an issue corrected by the Court without express consent from the defender.

*Macneil*, opened for the pursuer, and stated the facts.

*Cockburn*, for the agent, maintained, That though the evidence went to establish that the protection had been shown, and the jury must

DUNLOP  
v.  
BUCHANAN, &c.

Stewart v.  
M'Donald, 6th  
July 1784. M.  
13989. See  
Wood v. Fullar-  
ton, 28th No-  
vember 1710.  
Mor. 13960.

go by that evidence, still damages ought not to be given as a punishment but reparation, and the pursuer had suffered very little.

*Monteith*, for the creditor and mandatory, stated, That the agent had misconducted himself, and as he was liable, the mandatory, who was merely present, without any interest in the matter, ought to be free. That the creditor having put his business into the hands of an agent with general instructions, is not liable for his misconduct.

LORD CHIEF COMMISSIONER.—I must hold, notwithstanding the case of Stewart, that when a person employs a man of business, and that man of business misconducts himself, the employer is liable in an action, and shall so state it to the jury, leaving Mr Monteith to move for a New Trial, or tender a bill of exceptions to that direction.

(*To the Jury.*)—This is an action for two imprisonments and a poinding, and for the agent I see no vindication ; and, if you believe the evidence, you must find him liable ; but in all cases the damages ought to be moderate, and, in the circumstances of this case, it would probably have been better had the action not been brought.



The case against the mandatory is rather stronger, as he had no professional call to be there, and he insisted on detaining the pursuer.

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v.  
BUCHANAN, &c.

The party I hold liable for all that was done either by himself or his agent, but it is by no means an aggravated case. On my view of the law you must give damages against him, but they ought to be reasonable, and moderate reparation for the injury done by his authorized agent. There has been a violation of the law, but no great injury done, and a jury ought in these circumstances to give moderate damages.

Verdict—"For the pursuer on all the issues, —Damages against Buchanan L. 1—against Young L. 2—and against Laurie L. 2 Sterling.

On the 19th December, a motion was made to apportion the expences amongst the different defenders.

LORD CHIEF COMMISSIONER.—If they all rested on one ground of defence, they must be conjunctly and severally liable.

*Moncreiff, D. F. and A. Macneil, for the Pursuer.*  
*Cockburn and A. E. Monteith, for the Defenders.*  
(Agents, *Charles Fisher and Alexander Hamilton.*)

POLLOCK  
v.  
BEGG, &c.

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GLASGOW.

PRESENT,  
THE LORD CHIEF COMMISSIONER.

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1828.  
Nov. 7.

POLLOCK v. BEGG, &c.

A jury discharged of consent, and a question of law as to the liability of Magistrates, &c. in damages, reserved for the Court.

THIS was an action of damages for wrongous imprisonment against two Justices of Peace, and the Minister and Session-Clerk of the parish of New Monkland, upon whose application the warrant was granted.

DEFENCE for the Justices.—The same acts are charged against them in another action.\* They are protected by 43 Geo. III. c. 141.

For the Minister and Session-Clerk.—The application was legal, or at least it was made *bona fide*, and was sanctioned by universal practice, and by authority.


#### ISSUES.

“ It being admitted that the defenders,

\* The issues in that case related to a warrant granted and executed at a subsequent period.

“ Doctor Clark, and Doctor Tennent, were  
“ Justices of the Peace for the county of  
“ Lanark, during the year 1825 ; and that the  
“ defender, Doctor James Begg, was Minister  
“ and Moderator of the Kirk-Session of the  
“ parish of New Monkland, during the said  
“ year ; and that the defender, Hugh Watt,  
“ was Session-Clerk of the said parish, during  
“ the said year ;

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“ Whether, at Airdrie, on or about the 20th  
“ day of November 1825, the defenders, Doc-  
“ tor Begg and Hugh Watt, or either of them,  
“ did wrongfully apprehend the pursuer, or  
“ wrongfully cause the pursuer to be appre-  
“ hended, by virtue of a warrant granted by  
“ the defenders, Doctor Clark and Doctor  
“ Tennent, to the injury and damage of the  
“ pursuer ?

“ Whether, on or about the said 20th day of  
“ November 1825, the defenders, Doctor  
“ Clark and Doctor Tennent, or either of  
“ them, did wrongfully grant the said warrant,  
“ or did wrongfully apprehend the pursuer, or  
“ wrongfully cause him to be apprehended, by  
“ virtue of the said warrant, to the injury and  
“ damage of the pursuer ? Or

“ Whether, at the time and place afore-  
“ said, the said Doctor Clark and Doctor Ten-

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“ nent acted in the lawful execution of their  
“ duty as Magistrates ?

“ Whether, at the time and place aforesaid,  
“ the said Doctor Begg acted in the lawful  
“ execution of his duty as Minister and Mode-  
“ rator of the Kirk-Session of the said parish,  
“ and the defender, Hugh Watt, in the lawful  
“ execution of his duty as Session-Clerk of the  
“ said parish ?”


*Jeffrey*, for the pursuer.—This is an action for an incompetent, illegal, and unconstitutional infringement of the liberty of the subject. This was not a proceeding against the pursuer for aliment of a bastard child, in which the Justices might have jurisdiction arising out of their criminal jurisdiction in cases of fornication, but it was an application to apprehend the pursuer for payment of a civil debt, which is illegal and oppressive, and clearly renders the defenders liable in damages, as there was not even a debt constituted.

Tait, Just. of  
Peace, 177, 272,  
278, and 279.

LORD CHIEF COMMISSIONER.—The only way to dispose of this point would be to bring the case before the jury, and after hearing the other party, I shall give my direction, which you have the means of bringing under review.

This was not discussed at any previous stage of the case, and seems an application by you not to be non-suited.

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*Jeffrey.*—The only authority I know on the other side is a dictum of Mr Hutchison, which is contradicted by subsequent cases mentioned by Mr Tait. The case of Bisset may be said to be purely civil ; but in the case of Smith a charge of crime was the foundation of the claim.

These all show that it is illegal to violate the liberty of the subject, except in a case *meditatione fugæ*, which is an exception from the general rule, and no analogy can be drawn from it.

The Act 43 Geo. III c. 141, only applies to justices in their execution of a statute, and all the cases are subsequent to that statute, and where, as in this case, they act without jurisdiction, it does not apply.

*Moncreiff, D. F.* for the defenders.—This act of the defenders was once charged as malicious, but as that is now dropped you will give them credit for good intention while acting in their official situation. The offence with which the pursuer was charged, was that of abandoning his child and absconding.—In these cir-

1. Hut. Just. of Peace, 291.  
Tait, Just. of Peace, 52.  
Bisset v. Murray. May 15, 1810 ; Smith v. Likely and Crawford, Feb. 12, 1812 ; Philip v. Magistrates of Anstruther, 23d June 1748, Mor. 13053 ; Rae Muir v. Sharp, July 10, 1811 ; Milhollan v. Dalrymple, Dec. 21, 1826 ; Renton v. Berwickshire Justices.

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Tait, Just. of  
Peace, 52.  
1 Hut. Just. of  
Peace, 282.

Raeburn v. Reid,  
June 4, 1824, 3  
Sh. and Dun.  
104; Gentle v.  
M'Lellan, July  
9, 1825.  
2 Hut. J. P. 79  
and 80, 17 Geo.  
II. c. 5, § 2.—  
Bank. 42, 58.  
Boyd's Justice.

Walker v. In-  
nes, 21st No-  
vember 1822.

cumstances, one of the justices orders him to be detained, that he might have another justice present, and the ultimate order was to find security to appear within six months in an action.

The pursuer does not come with clean hands, and he makes his claim against those who are acting gratuitously. He was liable to be taken as a vagabond, and justices have power to imprison to enforce security. Mr Hutchison, whose work was revised by Sir Ilay Campbell, sanctions this, and Mr Tait only doubts whether it is correct, but admits that the practice is as stated by Mr Hutchison, and that part of the statute applies to Scotland. It is hard if justices are excluded from the benefit of the statute. The case of Bisset has been shaken, and is stated to have been misunderstood. If the doctrine of the pursuer is correct, it must apply to the case of master and servant, which is purely civil, and yet justices have jurisdiction in it.

Reference might also be made to the stat. 1672, 1579, and various others as to the poor laws.

It is said the application was for payment, and that the justices only order security; but if the greater was within their power the lesser is included in it. Walker's is another case of civil jurisdiction.

Though malice may not be necessary in the issue, yet on the facts of the case you must be satisfied that it is proved before damages can be given, and in the present instance, as the defenders were called on to act in discharge of a duty, though there may be error, still there may be no damage.

*Jeffrey*, in reply, This was not a criminal proceeding, which is an answer to most of what has been urged.—This too was an application for imprisonment *in initialibus*. *M'Lellan's* was a case for punishment under a statute, and *Anderson's* a case of an order not prayed for.


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July 9, 1825.

Anderson v.  
Campbell, 13th  
Feb. 1826.

LORD CHIEF COMMISSIONER.—This is one of the most severe and trying situations in which a judge can be placed, and it does seem to me that it will prove an interruption to justice, unless some means are devised by which the opinion of the Court can be taken upon points of this sort. In the situation in which I am now placed, I am called on to make up my mind on lengthened arguments in which reference has been made to numerous authorities and cases. I mention this not from a wish to shrink from any duty I have to discharge, but as a reason for the view I take of the case; and I lay it before you that you may

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assess damages if you think they ought to be given.


The evidence here is such that there is no doubt that this person was the father of the child—that he was skulking—that when discovered and taken up he was violent, and threatened to strike the messenger, who was bound to execute the warrant. In these circumstances, and without the knowledge of any of the defenders, he is handcuffed to an officer to prevent his escape, or a repetition of the violence. Was not this necessary from the conduct of the pursuer ; and even if it was not, can you hold three of the defenders liable for what was done without their knowledge ?

Even if I lay it down that the apprehension was lawful, those who were guilty of excess may be liable. The situation in which the messenger puts him amounts to imprisonment, but it is a very serious subject of consideration if even Dr Clark, who granted the warrant, is liable for what he did not see or directly warrant. The pursuer is brought before the justice, and is not unleniently dealt with, and he brings this action with all the circumstances about him, of being the father of the child, having deserted it and left the parish, of being violent when taken, &c. He ought to come



with clean hands ; and as to three of the defenders, they appear to me out of the case, as nothing has been proved against them. As to the minister and treasurer, the law laid down does not apply, as the evidence does not touch them ; and the same may be said of one of the justices.

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The question of malice was discussed before the case came to trial ; and I wish this question of the illegality of the warrant had also been brought into view, as I should then have had time to examine the point. I think the parties should agree to withdraw the case now, that the law, which is not of common occurrence, may be considered and decided in the Court of Session.

If the parties will not consent to withdraw the case, I have no power to nonsuit and let the party try it again. The only remedy is by a verdict. But the most convenient way would be to withdraw a juror, and consent to bring the question before the Court of Session.

A minute was accordingly given in, consenting that the jury should be discharged, and that the other case against the justices should also be treated in the same manner.

The cases were brought before the Court on

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v.  
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the 20th November, on a motion to retransmit them to the Court of Session; and on the 27th his Lordship said, It appears to the Court that these cases fall under the provision of the statute, as to the remit of untried cases, and they are sent to the Court of Session that the liability of Magistrates in such circumstances might be ascertained. \*

*Jeffrey and Donaldson*, for the Pursuer.

*Moncreiff, D. F., Forsyth, and Hosier*, for the Defenders.

(Agents, *Wm. Wotherspoon*, s. s. c.—*Wm. Waddell*, w. s.)

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GLASGOW.

PRESENT,

THE LORD CHIEF COMMISIONER.

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1828.  
Nov. 8.  
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MILLAR v. MARSHALL.

A declarator to have it found that a calico printing manufactory was a nuisance.

AN action of declarator for the purpose of stopping a manufactory for printing calico as a nuisance.

DEFENCE.—A denial that any thing rendering it a nuisance issued from the work, or that it was the cause of the pollution of the stream; and that it had been acquiesced in for thirty years.

Nov. 12, 1829.

\* The Court held the proceedings illegal and irregular, and again remitted the case to the Jury Court.

## ISSUES.

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v.  
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“ It being admitted that the pursuer is proprietor of the lands of Netherfield or Bran-drumhill, Lightburn, Over Carntyne, Wester Mailing of Wester Cunshlie of Provan, and part of the village of Lightburn ;

“ It being also admitted that a stream of water, called Lightburn, runs through the said village, and a part of the said lands, and forms the boundary of other parts of the said lands ;

“ It being also admitted, that, on the 15th of March 1824, and prior thereto, there existed upon ground situate higher up the said stream, a certain manufactory, the property of, or possessed by, the defenders ;

“ Whether, on the said 15th March 1824, and prior thereto, or on the said 15th March, and subsequent thereto, the defenders, by bleaching, dyeing, or other operations carried on by them in the said manufactory, did cause certain matter to pass into the said stream, whereby the water of the said stream is polluted and spoiled to the nuisance of the pursuer ; whereby the said property of the pursuer was, on the said 15th day of March 1824, and prior thereto, or on the said 15th day of March, and subsequent thereto, deteriorated, and the pur-

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“suer, and the inhabitants of the said village,  
“incommoded and annoyed in the enjoyment of  
“the said property and houses, to the loss, in-  
“jury, and damage of the pursuer? Or,  
“Whether the pursuer or his predecessors  
“did agree to, or acquiesce in, the erection of  
“the said manufactory, and the passage of the  
“said materials into the said stream, or did ho-  
“mologate and sanction the same?”

*Hope, Sol.-Gen.* opened the case for the pursuer, and stated the facts, and what he considered as sufficient to warn the defenders that the predecessors of the pursuer did not acquiesce in the erection or continuance of the work—that the work was formerly carried on to a small extent—and that the tenant had been ordered by the Sheriff to carry off the foul water by a roan. A degree of inertness may cut off the claim of damage, but will not warrant the continuance of a nuisance. The water was formerly peculiarly good, and is now unfit for man or beast.

Arrot v. Whyte,  
4 Mur. Rep.  
161.

*Jeffrey*, for the defender.—This is a clear case on the acquiescence, as the pursuer allowed large sums to be laid out on the works. It is unnecessary to say much on the law of nuisance, which is that of common sense, and de-

pending on circumstances. Except where health or life is injured, nuisance is a question of circumstances and degree ; and this is a work in a situation where it is no nuisance. Much shorter acquiescence than this, and mere looking on without doing any thing, has been held sufficient ; but here the party gave his land as gardens for the men employed at the work. In 1799 an agreement was entered into, by which the dirty water was to go into the burn, and pure water was to be conveyed in a roan to a brewery on the pursuer's property. All the complaints mentioned were for breach of this agreement, which sanctioned what is now done.

It is said the work has been increased.—If that is the fact, they can only put down the excess, and must show at what time it took place, which they have not done.

LORD CHIEF COMMISSIONER.—I am satisfied that it will turn out, that the questions on both issues, are for you, the jury, though I do not say your findings on them will not include some proposition in law. In case of a stream passing through the lands of different properties, each proprietor is entitled to have the water running through his land in the same quantity and quality, and in the same time, as it has ever been,

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Aiton v. Douglas and Melville,  
May 19, 1801.

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and any thing which injures that right may be treated as a nuisance, provided the fact of injury is made out. All the proprietors are entitled to use the stream for the ordinary purposes of life, and if that injures the right of another he has no redress ; but if the pollution of a stream arises not from the natural use of the stream, the individual so using it is liable, unless the other has submitted to the use made of it. It is material in this case that the pollution arose from an act of an individual at a much earlier period than the complaint. But if you are satisfied that the stream was polluted, and that it was of the nature of a nuisance, and not acquiesced in, you must find for the pursuer.

This stream appears formerly to have been pure, and to have been applicable to agricultural and culinary purposes ; but it does not appear to have been the only water employed for these purposes, as it was so small that it was dried up in summer ; but still the law of running water must apply to it.

The conclusion for damage in the first issue is a mistake, as this is a case of declarator, but, in considering the evidence, you must make up your minds whether this is polluted to the extent of a nuisance, and you must attend to the fact, that it is not spoiled during the whole year,

and there is contradictory evidence as to whether the pollution extends as far as the village. The general tendency, however, of the evidence is, that in drought and in summer it is polluted even below the village, and were this a question of damage, the injury at this place would be a material ingredient.

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MARSHALL.  


This being the state of the stream, the question is, by what acts it came into this state, and whether the acts have been acquiesced in ? The question of acquiescence may arise in a court which judges of law and fact, but here it must be decided by the jury. The defender, who must make out this, gives no evidence, but rests his case on what he has got on cross-examination from the witnesses called by the pursuer in anticipation ; and it is for you to say whether he has made it out by the documentary evidence or cross-examination of the pursuer's witnesses. The evidence of acquiescence and non-acquiescence, and the evidence of the extent of the works (which his Lordship stated,) at different times, requires most serious consideration. The view taken by Mr Jeffrey, that it is only the excess which the pursuer could put down, would lead to specific findings, which it would be very difficult to make out in the loose state of the evidence.

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MARSHALL.



The complaint here is by a proprietor of land that this stream is rendered unfit for the purposes of living, and for watering cattle ; but one great branch of the evidence was proving complaints by the tenant of a brewery, that the roans for conveying pure water to the brewery were not kept in order. Had my attention been sooner drawn to it, I would have held this *res inter alios*. The complaint was of a different nature from the present ; and can it be said to be an interruption by the proprietor ?

A witness was called to prove that a defender had said he knew the pursuer did not acquiesce. An admission by a party is the strongest evidence, but proof of a common observation by a party is the weakest, and you must consider whether this is proved to have been such an admission.

It is established that the pursuer resided near the spot, and ought to have been acquainted with what was doing ; and, on applying your good sense to the whole facts and circumstances, and taking my observations so far as they appear to you good, you are to find for the pursuer or defenders. If you are of opinion that the stream is deteriorated, and that it has not been acquiesced in, then you will find for the pursuer. If the case rested on the first issue,



I would think the finding should be for the pursuer; but if, on the whole facts and circumstances, you are satisfied of the acquiescence, then you will find for the defenders.

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Verdict—"For the pursuer."

A rule to show cause why there should not be a New Trial was granted, but after hearing counsel the rule was discharged. Feb. 12, 1829.

*Moncreiff, D. F., Hope, Sol-Gen., and Millar* for the Pursuer.  
*Forsyth and Jeffrey*, for the Defenders.  
(Agents, *John Meek*, w. s. and *William Wadell*, w. s.)

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NEW TRIAL.

PRESENT,

LORDS CHIEF COMMISSIONER AND MACKENZIE.

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WIGHT v. LIDDEL.

1829.  
Jan. 8 and 9.

THIS case was originally tried on the 21st July 1827, (See 4 Mur. Rep. 325,) and a verdict returned for L.2021, and L.334 for breach of bargain.

Finding for the  
defender on a  
question of de-  
murrage and  
damages.

*Jeffrey* opened for the pursuer, and stated

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the facts ; and that, as the defenders had not wood ready, they were not entitled to plead that the vessel was detained by the frost. If there had been wood for a half cargo, the vessel might have sailed, and the owners would have been entitled to only half freight.

A log-book not evidence while the persons acquainted with the facts are alive.

When the log was mentioned,

LORD CHIEF COMMISSIONER.—The log-book is an assistant to the memory of those who are acquainted with the transactions entered in it. I do not say, that, if they are all dead, it does not become principal evidence itself ; but the best way is to call those acquainted with the facts.

Query, Is the master of a vessel entitled to look at the log-book to refresh his memory ?

When the master of the vessel was called, it was proposed that the log-book should be put into his hands.

LORD CHIEF COMMISSIONER. — When a person makes a memorandum of a fact at the time when it occurs, he may refresh his memory by looking at it, as he had no interest or view in making it. The log-book is just a memorandum, and there is no objection to the mate who kept it looking at it to refresh his memory ; but the master, though he superintends the keeping the book, is a step farther down.

This book is not even authenticated, and is not evidence. At a distance of time it may be fit that the witness should be allowed to refresh his memory by seeing it, and reading the entries, though I will not say whether that is to be done before or after his cross-examination. In the meantime, it appears to me better that the mate should be called to authenticate the book. I am the more anxious to have this subject sifted by argument, as in a case already tried I deviated from the strict rule.

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*Hope, Sol-Gen.*—We think we are entitled to cross-examine him on his memory, and that they are not entitled to prepare him in this manner for our examination.

A log-book may be referred to, where the recollection of the master is not distinct.

*Jeffrey.*—We might have given him the book before, and desired him to get it by heart.

LORD CHIEF COMMISSIONER.—We think it may be read after, not as evidence contradicting the witness, but as matter to which reference may be made where his recollection is not distinct.

The master of another vessel was called to prove that he had been directed by the defenders to go to another port, at which there was a want of wood.

In an action of damages for not supplying timber, evidence admitted that the defenders direct-

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ed another vessel  
to a port  
in the neigh-  
bourhood where  
there was a  
want of timber.

*Hope, Sol-Gen.* objects, This is clearly incompetent, as the question is, Whether there was a want of wood at Brewley, and not at the port to which the witness was sent?

*Jeffrey.*—This may not be conclusive, but is clearly admissible evidence to show that there was a scarcity of wood in the neighbourhood. It would be competent for the defenders to prove that they had plenty of wood at this port, to which they might have sent our vessel.

LORD CHIEF COMMISSIONER.—The difficulty arises here entirely from not taking a clear view of the question to be tried. This case arises out of a contract, by which the defenders are to supply a certain quantity of timber, and the only place mentioned in the letters, admission, or issue is Pictou. I do not from this say that Pictou is the place where it is to be got, but it is to be got from persons residing there, who have a number of ports at which timber is delivered. This evidence is tendered to show that the persons who made this contract had not a supply of timber in the neighbourhood. If the object of this is to ascertain the quantity of wood belonging to the defenders in the ponds, I think it admissible, as it goes to affect their capacity to furnish wood

in the neighbourhood of Pictou. This evidence appears to me to bear directly on the case, especially as there is contradictory evidence. But it must be confined to ponds or reservoirs of the defenders.

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v.  
LIDDEL.

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The witness was then asked, whether the owners of his vessel made a claim for demurrage.

LORD CHIEF COMMISSIONER.—What is done by one set of owners will not affect others. The case to be tried is one of damages claimed by the pursuers for detention of the vessel by the fault of the defenders. The damage here is demurrage, which arises out of a legal conclusion from the detention of the vessel.

In an action of demurrage, incompetent to prove that it was claimed by the owners of a vessel in similar circumstances.

A witness was asked, whether he knew the fact, that a vessel sent by him had been detained for want of wood, and whether Mortimer and Co., the agents at Pictou, admitted the fact in a reference of the question to two merchants?

Incompetent to prove an admission made by the defenders in a different cause.

LORD CHIEF COMMISSIONER.—It is only distinct admissions by them that are admissible.

Allowing what is now proposed would be trying this case by another, which is quite incompetent; it cannot follow, that, because the defenders had another cause, this is to be decided by it.

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v.  
LIDDEL.



*Moncreiff, D. F.* opened for the defenders. —It is surprising that the pursuer should expect damages even on the evidence as it now stands; but we shall contradict all that is important in his evidence. The defenders are not to be liable if the vessel was detained by the frost, and not by want of wood. There was plenty of wood in the ponds, where the master was bound to send for it; but if there was a want of wood, he ought to have protested and returned in ballast.

It is said that he would thus have lost his freight, that is, he must incur demurrage in order to entitle him to freight. The rule, that where no goods are carried, no freight is due, is just and reasonable; but if the want of goods arises from the fault of the freighter, this cannot be the rule, as it is nonsense. The authorities refer to the case of partial delivery from a partial loss, where the freighter has done his duty.

Abbot's L. of  
Shipping, 300,  
edit. 1827.  
Holt, 435, 1 Bell  
541 and 572.

Jan. 9.

In a continued correspondence, a party may give in evidence his own letters in explanation of those of the other party, but not if they have been produced in order to get in his own letters.

After certain letters written by the pursuer were produced, it was proposed to give in the answers from the defender, to produce impression, to which an objection was taken.

LORD CHIEF COMMISSIONER.—The difficulty here is, that in a continued correspondence

the answers may be necessary to make it intelligible, and therefore they are admissible ; but if the pursuer's letters are given in not as evidence against him, but to get in the answers, that would operate injustice.

The jury have too much good sense to act on any impression, or any thing, but the evidence.

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v.  
LIDDEL.

When an objection was taken to the production of a letter from Bell and Company to Johnston and Wight,

A letter from a  
third party not  
evidence.

LORD CHIEF COMMISSIONER.—There are two ways of considering this ; but the simplest and most obvious is, that, supposing it competent to prove the matter, this letter is not producible in evidence, as it is not on oath, and there is no ground for letting it in. On this ground I have no hesitation in rejecting it.

The other ground is, that it is incompetent under this issue.

LORD MACKENZIE.—I do not see how we can go into this argument, which is intended to show that there is no title to pursue. Having got into this issue it is too late to go into the question, whether Bell should have been subjected ?

WIGHT

v.

LIDDEL.

In a question with the freighters of a vessel, incompetent to prove statements by one of the owners to the captain.

It was proposed to prove statements made by Mr M'Bride at Pictou, to which the pursuer objected that he was not his servant, nor was he responsible for him.

*Hope, Sol.-Gen.*—It is competent to prove the acts and deeds of a person who might also be a witness. The question is, whether the detention was caused by the weather or want of timber; and is not the declaration to the captain, by M'Bride, a part-owner of the vessel, most important.

*Jeffrey.*—This may be important, but it is incompetent. In the action with Bell and Company, M'Bride was a *party*; but here he might have been a witness, which renders it incompetent to prove his declarations.

LORD CHIEF COMMISSIONER.—I am extremely sorry that a question of this sort has arisen to prolong the litigation, in a case which has already existed for fourteen years; but, when called on to discharge this duty, we must decide.

This originates in a mistake of the relation of the parties. M'Bride is a part-owner of Bell and Company's vessel,—this vessel is freighted by Johnston and Wight,—when thus freighted, the owners part with the command



of the vessel, and what the master and crew say is evidence against the freighters, as they become their servants. The master must act on his own judgment, though this may be influenced by the advice he gets. This is not, however, sufficient, unless it is said the owners interfered and took the management of the vessel out of the hands of the freighter.

The doctrine of hearsay applies in this case, which is, that nothing should go to a jury except under the solemn sanction of an oath, and that it ought not to depend on the fragile memory of a witness, as to words spoken by another. M'Bride is like any other indifferent person, and I do not see on what principle we can receive evidence of what he said.

It would be infringing the rules as to hearsay, if we admitted this as evidence.

The witness was then asked as to statements made by Bowerley the captain.

LORD CHIEF COMMISSIONER.—You may ask what Bowerley said to M'Bride, but not the answers given,—at least you ought to get all you can as to what he said, before you ask as to the answers. But it is like a correspondence in which the answers may be necessary.

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Statements by  
the captain of a  
vessel admissible  
against the  
freighters.

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A person, in  
whose business  
the defenders had  
had a share, re-  
ceived as a wit-  
ness.

A witness was then called, who stated in his examination *in initialibus*, that he managed for Mortimer and Co. at Pictou, and that they had a share in all his business, though he had not a share in all theirs; but that their connection in business was terminated and settled, and that he could not lose or gain by this suit.

*Jeffrey.*—In fact, this was the seller of the wood upon which Mortimer and Co. had merely a commission of 4 per cent. The one provides the article, the other the market, and guarantees the price, and has a share of the profit in his commission, and thus he is a latent partner.

*Hope, Sol.-Gen.*—Mortimer and Co. may procure the wood where they please, and this person cannot be liable, because he furnished the wood. He was not a partner, and this verdict can never be used against him.

LORD CHIEF COMMISSIONER.—I have sifted my mind with jealousy on this subject, and I cannot help thinking that this question has arisen from the popular and loose employment of the words partnership and guarantee. This objection is not taken on how far the verdict may be used against this person, but purely the objection of interest, and the interest stated is

partnership. Partnership or not, cannot be got from the witness, but is an inference to be drawn from the facts stated by him.

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LIDDEL.  
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When an objection to a witness is nice or doubtful, the leaning is to admit the witness, and allow it to go to his credit, not competency. It is clear from the facts stated, that he was not a general partner of Mortimer and Co., but that they were parties to transactions of a peculiar nature.—At times he sells to Mortimer and Co., at others he ships the wood for Europe, and they have a commission on the price. The agreement of sale is finite and complete at the time, with the price to be fixed at a future period ; but the rise and fall of the price does not affect him so as to create any common interest between him and Mortimer and Co. Is this to be held and construed into what is called a partnership, in which a person is liable to his last shilling ?

LORD MACKENZIE.—I concur in this opinion. There was an agreement between him and Mortimer and Co., part of which was that they were to participate in his business, but this does not affect the present case.

Another part of their business comes nearer the case, by which he got wood in the country

WIGHT  
v.

LIDDEL.

A person to whom depositions of other witnesses were sent, rejected as a witness.

Tait's L. of Ev.  
378, 389, 397.

and supplied it to them. The questions were inaccurately put to the witness, and it was evident that all he meant to state was, that Mortimer and Co. were to take the wood and pay him the price, deducting 4 per cent. The measure of the price being fixed by the selling in Britain, brings the case near a partnership, but I do not think it is one.

The objection of partial counsel was then taken to the witness.

*Cockburn*, 'This is a foreign witness, who is as near as possible being a party, and who has been instructed how to depone, being shown the substance of depositions, and he suggested witness to be called. These taken together ought to exclude him.

*Moncreiff*.—The question of partnership is settled. I will not argue the point of his suggesting witnesses. He did not intrude, but merely answered questions when put to him.

LORD MACKENZIE.—Two objections are taken, the one, that he was asked who could be witnesses in the cause, which was most natural; the other, that affidavits in the cause were sent to him; and the question is, whether he acted as witness or agent? If such documents

are unnecessarily given to a witness to read, a good deal turns on the fact of whether it was done by the party. It would be a strong expression in this case to say that the witness was rejected in *odium corruptentis*, but it is on account of the carelessness of the party in having sent these papers to the witness. On the cases I cannot doubt that we must hold this to be instructing the witness, however innocently it was done.

WIGHT  
v.  
LIDDEL.

LORD CHIEF COMMISSIONER.—The leaning of my mind is to allow such an objection to go to the credit, not the competency, of the witness ; and as this individual may misunderstand the ground upon which we reject his testimony, I wish him called back, that I may explain to him that it is nothing affecting his moral character.

An objection was taken to the production of a deposition, as the affidavit did not state that the witness refused to come, but merely that he was not here.

The depositions of a foreigner received without an affidavit that he would not attend the trial.

LORD CHIEF COMMISSIONER.—This witness is a foreigner, and the presumption is, that he will not come.

WIGHT  
v.  
LIDDEL.

At a second trial reference ought not to be made to the proceedings at the first, except as to legal precedent or determination.

When a deposition was produced, it was objected that the deponent was a legatee of Mortimer and Co. and though they were insolvent, the verdict in this cause might possibly restore them. The deposition was not read at the former trial.

LORD CHIEF COMMISSIONER.—It is a sacred rule, that in a second trial no reference ought to be made to what took place at the first ; and, on a former occasion, I checked such a reference, and wish it to be taken as a precedent. If there is any thing of legal precedent or determination, that may competently be referred to.

*Cockburn*, in reply, This case depends on a few dates and documents ; and the questions are, Whether there was time to get a full cargo, and whether there was wood ? We say there was time for a full cargo ; at all events there was time for a half cargo ; but that there was no wood. We cannot recover if the demurrage was caused by the fault of the captain ; but he was not bound to come without a cargo before his lay-days were out.

LORD CHIEF COMMISSIONER.—I am glad that our minds are relieved from the consid-

ration of some matters which have been agitated in this cause, and I shall put it in such shape, and make such statements, as I trust will be of use in showing the grounds of your verdict, as it is purely a question for the jury on the evidence.

WIGHT  
v.  
LIDDEL.  


We are here to discharge ourselves on a question sent by the Court of Session, and not as to what acts of the captain will defeat the claim of his owners for damages. The question is, Whether, on weighing the contradictory evidence, you are of opinion that the vessel was detained by the weather, or by want of wood.

The first issue might have been admitted. The second contains the true question between the parties.

The wood was not put on board in due and proper time; but the difficult question is, Whether this was a failure on the part of the defender, and in considering this, the letters constituting the bargain are of great consequence;—they point out the port of delivery—that there was a great quantity of wood,—that a cargo was set apart, which, if not taken away, would be kept at the expense of the pursuer.

No vessel was chartered till September; but it is a matter of some importance, that by letters from the parties which passed in the

WIGHT  
v.  
LIDDEL.



meantime, it appears that the defender did not think it too late ; and the question is, whether Johnston and Wight were not entitled to act on the belief that a cargo was ready for them at any time the vessel might arrive. It is for your consideration whether the defender should not have given notice that the 17th September was too late to sail ;—at the same time you will observe that she sailed later than usual. Some evidence was given to show that the captain remained to replace his long boat, and from other causes ; and if it is true that he did so, then the freighters must suffer for his acts. You are to say whether the days he was detained was by good and sufficient cause.

There was contrary evidence as to the practice in delivering the wood, and some very sensible men stated that it was the practice to go to the ponds. If you are satisfied that there was plenty of wood there, in a situation to be loaded, you will be disposed to find for the defender. You will also keep in view whether the captain acted in spring as an active captain would have done, and if he did not, whether it is probable he acted differently in winter. The question is, Whether, if there was plenty of wood in the ponds, this was not implement of the contract ?



On this part of the case the questions are, Whether the delay of sailing from Britain was too great? Whether the pursuer was not relieved from this by the defender not putting him on his guard or Mortimer and Company not protesting? Whether the delay in America was not caused by the contumacy of the master? Whether his conduct in spring does not corroborate his conduct in winter?

WIGHT  
v.  
LIDDEL.

The evidence as to the time required for loading was not so precise as is desirable, and it is very difficult for the general evidence to meet the particular evidence in the case, as it is necessary to recollect that frost coming on, and the general state of the weather necessarily caused delay, and perhaps may account for the difference from sixteen to forty days, which is the time specified by the witnesses.

On the whole, after you have made up your minds, you had better find for the pursuer or defender, and if for the pursuer, then the damages under different heads, so that if the Court of Session think any part not due they may know how to deal with it.

Verdict—"For the pursuer on the first issue, and for the defender on the second issue."

*Jeffrey, Cockburn, and Cuninghame, for the Pursuers.*

*Moncreiff, D. F. and Hope, Sol.-Gen. for the Defenders.*

(Agents, *W. Cook, w. s. and J. Mowbray, w. s.*)

SCOTT  
v.  
WILSON.

1829.  
Feb. 4.

PRESENT,  
LORD CHIEF COMMISSIONER.

SCOTT v. WILSON.

A finding that the magistrates of a burgh had no right to collect custom on barley or other articles not purchased in the market of the burgh.

THIS was an action of reduction of a decree of the Magistrates of Hamilton; of repetition of the sum decerned for, and of declarator that they had no right to exact custom on barley or other articles not purchased in the market of the burgh.

DEFENCE.—The defence relied on was, that by usage the Magistrates were entitled to exact custom on grain brought into the town, though purchased beyond its limits.

#### ISSUES.

“ It being admitted that, in the year 1823,  
“ and prior to the 25th day of April, in the  
“ said year, the pursuer brought into the town of  
“ Hamilton 100 bolls of barley, purchased be-  
“ yond the limits of the said burgh, for the  
“ purpose of being converted into malt, and used  
“ in the brewery of the pursuer.

“ Whether the defenders wrongfully exacted,  
 “ or wrongfully caused to be exacted, from the  
 “ pursuer the sum of 8s. 4d. Sterling, or any  
 “ part thereof, as custom upon the said 100  
 “ bolls, and the sums of L. 13, 8s. 5d. Sterling  
 “ of expences, and L. 2, 15s. Sterling, as dues  
 “ of extract, or any part of the said sums, to  
 “ the loss, injury, and damage of the pursuer ?”

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 v.  
 WILSON.



*Jameson* opened for the pursuer, and said,  
 The burgh was erected by a charter from the  
 Duke of Hamilton, which gives them right to  
 the duties, in a table made or to be made, but  
 the only tables sanctioned by the Duke were  
 applicable to fairs and weekly markets, not to  
 grain bought beyond the burgh. The only  
 right they have is to a duty on goods sold with-  
 in the burgh, which may apply to shops, but  
 not to the pursuer.

When the deposition of a witness examined  
 in the Inferior Court was tendered in evidence,  
 an objection was taken that the stamp required  
 by the 4th and 8th sections of the Stamp Act  
 then in force was wanting.

An unstamped  
 deposition taken  
 in an inferior  
 court not admit-  
 ted in evidence.

*Cockburn.*—The witness being dead, it is  
 competent to prove statements by him at any  
 time. This party pleaded on this proof before

SCOTT  
v.  
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the Magistrates, and the expences in the issue are for proceedings on it.

*Jeffrey.*—No consent could cure this, as the Court are bound to look to it ; besides, this is a different case, as the Magistrates are the parties here.

LORD CHIEF COMMISSIONER.—When a person is dead, his statements made on the highway may be proved, but this being a deposition, is in a very different situation ; and if the pursuer relies on it, something more must be stated.

*Cockburn.*—The tacksman is a party to both actions, and his proof in the former case is in the same situation with ours. Even their original petition is not stamped, and no competent decree for expences could follow on it. This is an attempt to succeed by a trick, which would make a New Trial necessary, on the ground of surprise, as in the cases of Ronald, at Glasgow, and of Clark v. Thomson. They have attempted to supply the defect as to the petition by attaching a sheet of stamped paper.

1 Mur. Rep. 180.

*Jeffrey.*—We maintain that they were stamped in the Inferior Court.

LORD CHIEF COMMISSIONER.—I cannot in

this manner avoid a revenue law, but must enforce its regulation. This is not the question we are to try here ; but whether grain, in the situation in which this was, is liable in payment of the custom demanded ?

SCOTT  
v.  
WILSON.

*Jeffrey* opened for the defenders, and said, The pursuer wishes to raise a doubt as to the right of the Magistrates to collect what is the principal source of the revenue for maintaining the police of the burgh. Mere possession is sufficient to justify the collection ; and for sixty years custom has been collected at the shops, not the market. By the charter we have a right to custom on all grain ; and as the pursuer fails in establishing an universal practice of exempting grain, the verdict must be for the defenders.

LAWSON, &c. v.  
Thomson, 5th  
August 1768.  
Mor. 1965, and  
1 Hailes' Dec.  
236.

*Cockburn* in reply.—This is to try the legality of a burgh tax ; and the tendency of all burghs being to encroach, they must show a clear title ;—here they have failed.

The exaction was wrongful, 1<sup>st</sup>, Because the decree of the magistrates proceeded on an unstamped proof, proceeding on an unstamped petition. 2<sup>d</sup>, Because they have neither statute nor immemorial usage. This was laid down as law in the case of Angus and Magistrates

4 Mur. Rep.  
339.

SCOTT  
v.  
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of Edinburgh, and the bill of exceptions taken on that occasion was disallowed.

The only right by the charter of the defenders is to collect custom at the markets, and even if this includes shops, it will not affect the present case, as it must be on goods brought for the purpose of sale, but here the grain was brought for brewing.

LORD CHIEF COMMISSIONER.—Before proceeding to state to you the admission and the issue, I shall make a few observations, which are more for counsel than for you, and then I shall be in a better condition to show the principle, and how the proof applies to the practice.

Much has been said as to the proof not being stamped, and I still retain my opinion that it was inadmissible in evidence. If it had been stamped in the same way the petition was, the result might have been different, but it would have been better to have got the proof stamped, though I am not prepared to say, that if the stamp was paid, though the writing was on a different paper, that it is to be rejected as an unstamped document. There is much irregularity in the stamp attached to the petition, as there is no date upon it, but merely the title of the paper. I do not, however, mean to tell

you that on account of this irregularity you are to find your verdict. And even if we had the power to nonsuit, I am not sure that a nonsuit would have been the proper course. I shall therefore state it to you as a case totally independent of this, and which you are to consider on its merits.

Herethere are twospecies of evidence. There are documents showing the right to impose a tax in the burgh, and there are witnesses to show how it has been used and exacted. The general doctrine on this subject is clear. There must either be a statute or uninterrupted uniform practice for a sufficient time to justify the exaction. In every case the doctrine must have reference to the facts, and the facts here are, that there is an act of Parliament and a charter by the family of Hamilton, enabling the town to impose taxes according to a table to be made ; but the question remains, whether there is authority for what is here claimed, and the amount of the sum is of no importance.

You must attend to the admission as well as the issue, and if, on the whole case, you think that barley is exempted, then you will find for the pursuer, and he will get back what he has paid, but if not, then for the defender. The admission does not show where the barley was

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v.  
WILSON.



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v.  
WILSON.  
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purchased, but merely that it was beyond the burgh, and that it was for the purpose of manufacture. From the proof, independent of the admission, it might have been thought that there was a special exemption of barley bought in Glasgow; but it is to be considered merely as a place beyond the burgh, and the term foreign, as used in the evidence, must be held applicable to all grain not the produce of the farms in the neighbourhood.

This issue is, Whether this was exacted wrongfully, or according to the right which was in the Magistrates of the burgh; and the question is, how far this right has been made out or defeated? Whether it has been established by a deed which could legally establish it; or whether it is so made out, as to establish it on the practice. Legal authority consists in a statute, charter, or clear grant, or a presumption of such a grant, by a proof of steady well established practice of unresisted payment. As there is nothing in the act, the charter, or terms of the table to justify the exaction, the question is, Whether there is usage to establish such a grant? And whether, on the whole circumstances of this case, the exaction was wrongful.

The statute, which was a private one, was



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intended to change the market-day, and to establish two fairs ; and there is no doubt the family had a right to grant the charter. The only question is, what they did grant ? The grant is to collect dues at fairs and markets, and a table as early as the charter imposes a certain sum on victual, which would include barley ; but does it apply to the circumstance here, or does it apply only to what is bought in fairs and markets. To meet this objection, evidence was given to show that the dues were collected in shops on other than market days, as well as in the market, and a usage seems established as to pot barley, though not sold in the public market. But the only question here is, Whether the pursuer's barley, according to the grants and usage, is liable ? and you will attend to the evidence given as to custom not being exacted in cases similar to the present.

On the whole, if you think the pursuer has made out his case, or that the defenders have failed to prove the usage, then you will find for the pursuer. It is a case of evidence for you, and you are not to be biassed by my opinion. On the deeds I do not think the case made out.

Mr Forsyth wished his Lordship to take a note of his direction to the jury.

GIBB & MAC-  
DONALD  
v.  
WATHEN & Co.

**LORD CHIEF COMMISSIONERS.**—You may take the exception to my directing them to find for the pursuer, unless they find the usage proved in favour of the defender.

**Verdict**—"For the pursuer."

*Jameson*, for the Pursuer.

*Jeffrey and Forsyth*, for the Defender.

(Agents, *John Grainger*, w. s. and *Stewart and Sprott*, w. s.)

PRESENT,

LORD CHIEF COMMISSIONER.

1829.  
June 17 and 18.

GIBB and MACDONALD v. PAUL WATHEN,  
and Co.

Damages for fraudulently inducing the pursuers to enter into a contract, and for repetition of money paid under the contract.

**THIS** was an action of damages for fraudulently inducing the pursuers to enter into a contract; for repetition of L. 600 as over-payment under the contract; and of L. 1600, on account of short quantities furnished under the contract.

**DEFENCE.**—The defence on the merits was, that the defenders received and used a great part of the goods, and were indebted to the pursuers in the balance of the price.

## ISSUES.

GIBB & MAC-  
DONALD  
v.  
WATREN & Co.

“ It being admitted that Sir Paul Baghott,  
“ as an individual, or on account of Paul Wa-  
“ then and Co., entered into an agreement  
“ with the pursuers, in terms of missive let-  
“ ters, bearing date the 28th January 1825,  
“ being Nos. 4 and 21 of the counter-pro-  
“ cess at the instance of the defenders, whereby  
“ the said Sir Paul agreed to furnish to the  
“ pursuers certain Cashmere yarn, on the  
“ terms stated in the said missives :—

“ Whether, by fraud, misrepresentation, and  
“ deception, practised by the said Sir Paul,  
“ the pursuers were induced to enter into, and  
“ carry on the said agreement, to the loss, in-  
“ jury, and damage of the pursuers ?

“ Whether the said Sir Paul did violate the  
“ said agreement contained in the said missives,  
“ and failed to perform the conditions of the  
“ same, as to the quantity and quality of the  
“ yarn transmitted, or the time or manner of  
“ transmitting the same, to the loss, injury,  
“ and damage of the pursuer ? Or,

“ Whether the pursuers homologated or ac-  
“ quiesced in what was done by the defenders,  
“ in implement of the foresaid agreement ?”

In the counter process the issues were,

GIBB & MAC-  
DONALD  
v.  
WATHEN & Co.

“ It being admitted, that Sir Paul Baghott,  
“ as an individual, or on account of Paul Wa-  
“ then and Co., entered into an agreement  
“ with the defenders, in terms of missive-let-  
“ ters, bearing date the 28th January 1825,  
“ being No. 4 and No. 21 of this process,  
“ whereby the said Sir Paul agreed to furnish  
“ to the defenders certain Cashmere yarn, on  
“ the terms stated in the said missives :—

“ Whether the defenders are indebted and  
“ resting owing to the pursuers in the sum of  
“ L. 1666, 16s. 8d., or any part thereof, as the  
“ balance of the price of certain quantities of  
“ yarn transmitted to the defenders under the  
“ agreement aforesaid ? Or,

“ Whether the defenders, Gibb and Mac-  
“ donald, were induced, to the great hurt and  
“ injury of their trade and business, by fraud,  
“ misrepresentation, and deceit, to enter into,  
“ and act upon the said agreement : And,

“ Whether the said Sir Paul did, to the  
“ great hurt and injury of the defenders, in  
“ their trade and business, violate the agree-  
“ ment contained in the said missives, and  
“ failed to perform the conditions of the same,  
“ as to the quantity and quality of the yarn  
“ transmitted, or the time and manner of trans-  
“ mitting the same ?”

*Maitland* opened the case for the pursuer, and stated, That the defender brought an action for payment of the price of a quantity of yarn, which was met by the present action, on the ground that the defender had acted fraudulently, and that he was overpaid. The second issue is unnecessary, as we shall prove fraud ; and a departure from good faith subjects a party in damages.

The pursuers were led to believe that the yarn was manufactured in Britain,—that the defender was the only manufacturer,—and that the pursuers were to have right to the whole quantity manufactured. But on inquiry it was found that there was no truth in the representation made, but that the yarn might be imported from France at a lower price, and that the defender did not deliver the full quantity in the packages.

A witness being asked whether he knew that the pursuers believed a certain thing,

LORD CHIEF COMMISSIONER.—You must prove this by facts, not by the belief of the witness.

After discovering the fraud, the pursuers refused to receive a certain quantity of the yarn

GIBB & MAC-  
DONALD  
v.  
WATHEN & Co.

Incompetent to prove, that, in the opinion of a witness, the pursuer believed a fact.

As evidence of deficiency in packages of goods furnished, competent to prove that packages rejected were deficient.

GIBB & MAC-  
DONALD  
v.  
WATHEN & Co.

transmitted. When a witness, who had inspected this quantity, was called,

*Hope, Sol.-Gen.* objected, They wish to infer defect in the quantity accepted by the state of this which was rejected.

LORD CHIEF COMMISSIONER.—This is a case in which the quality of the yarn is in question, and that which is wrought up cannot be ascertained. This is yarn furnished under the same contract, and not worked up, and, though the evidence may not be conclusive, I think it fair for the consideration of the jury.

June 18.

*Hope, Sol.-Gen.* opened for the defenders, the Commissioners of Sir P. Baghot, and said,

The question is not whether Sir Paul used unfair means, but whether the defenders were induced to enter into the contract to their loss and damage. They have not proved that loss, and we shall show they made 50 per cent. profit. The yarn was fully equal to the samples, and the defender, knowing how it might be imported, was entitled to keep the secret and take the advantage of it. A manufacturer cannot receive and work up raw materials, and then object to them as not according to sample, and the profit made by the defender is no measure

of the loss of the pursuers, as they also made profit. The numbers on the packages had no reference to the number of hanks in the pound, but to the numbers attached to the samples, and the pursuers got the number of pounds weight charged, and of the quality of the sample.


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DONALD  
v.  
WATHEN & Co.

An objection was sustained to a question put to a witness, whether, in the opinion of the witness, a manufacturer, after receiving and using materials, is entitled afterwards to object ?

Incompetent to  
ask a witness  
whether a manu-  
facturer, after us-  
ing goods, was  
entitled to object  
to their quality.

*Jeffrey*, in reply.—The question here is, whether we are to get back the profits which this dishonest party has gained ? Whether lies were told for the purpose of inducing the pursuers to enter into this transaction, and whether they would have entered into it if these lies had not been told ? The pursuers suffered great loss and much anxiety, and is the defender to keep what he got by cheating ? The pursuers changed their machinery on the faith of this being a British manufacture, and not liable to the risk of war, &c. We do not say the goods were bad, but that they were of inferior value to what was indicated by the numbers which referred to the number of hanks in the pound, and not to the samples.

GIBB & MAC-  
DONALD  
v.  
WATHEN & Co.



The simplest way of disposing of both actions, is to make up your minds as to the damages, and then deduct L. 1666, the sum claimed in the counter-action.

LORD CHIEF COMMISSIONER.—The manner in which these cases have been treated is a great satisfaction to me, as it would have proved difficult for me to go into all the intricacies of the evidence. The question is now a simple one, and it appeared so to me from the beginning, though in the course of the evidence it became perplexed by the details which were gone into. All as to the particular quantities and character of the yarn may be thrown out of view, I shall therefore go to the issues and apply my observations to them.

There is no danger that fair justice will not be done from the circumstances of the defenders being English assignees. But this is a peculiar case, and in some points not yet fully before you. On the first issue, the single consideration is the fraud and misrepresentation. I hold this as applicable in two ways: 1st, Whether it was the foundation of the contract; and, 2d, Whether it was not a fence cast round the transaction, by which the pursuers were prevented from getting information. It is said there was



fraud and misrepresentation in both these respects, and you are to say whether it is proved.

With respect to the loss, it does not arise from the failure to furnish the article, but from the large prices paid by the pursuers.

To make out this case, there must not only be concealment and secret conduct on the part of the person accused, but the contract must have been brought about by active and crafty means used by him to effect this concealment. I shall not go into the evidence in detail, as it is sufficient to point out the date of the communications and the manner in which they were carried on. The first communication comes from Baghott; it turns out that the whole was completely false. He engaged to deliver an English article, and he delivered a French one, and the defenders, who stand in his shoes, must stand or fall by his conduct.

It may be said that the most honourable merchants do not disclose where they get their goods; but was this an innocent concealment, or a fraudulent misrepresentation that it was a secret British manufacture, which he only could furnish. But for the fraud the price might have been ascertained by the pursuers.

From the vouchers and the evidence, it appears, that in some cases the profit was as high

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as 68 per cent. and you must judge whether this was done without fraud, or whether there was such art and management to bring about the contract; and such concealment and misrepresentation of it being a French production as to vitiate the whole. If the price had been demanded for it as a French production, that would have been fair, but it is represented as British, and that the wool could only be imported by the defenders.

The question is, whether there was not fraud in the conception of the contract, followed by divers frauds in the prosecution of it, so as to entitle the pursuer to damages? If the fraud is made out, then acquiescence does not apply to the case, as the defenders come here to defend with unclean hands, and this plea cannot be set up unless there is some overt act so clear as to satisfy you that the pursuers continued the dealing after they knew the facts. In proof of this, two sorts of evidence are relied on:—1. Letters from the pursuers, which, I confess, appear to me natural. 2. Their ordering two quantities of the yarn. These you will consider.

The damages are stated at L. 5000, but you cannot give this sum, as the pursuers got goods which, at the prices they admit, reduces the sum to L. 2847 of additional price, which they

say they paid, but there is also damage claimed for the deficiency in weight and fineness of the yarn, and for the damage they have sustained by the fraud, the changes of their looms, &c.

The second issue does not depend on fraud, but is for damage on account of non-performance of contract. If, however, you find for the pursuers, you may assess one sum of damages.

Verdict for the pursuers — “ Damages L. 2333, 3s. 4d. *et c contra* for defenders.”

An application having been made for a rule to show cause why the verdict should not be set aside, and a new trial granted.

LORD CHIEF COMMISSIONER. — These cases were considered together, and the evidence on the second issue became very intricate ; but in the end the pursuers only went on the first issue ; and I told the jury that they must first satisfy themselves of the fraud and continued deception, artifice, and contrivance to prevent the pursuers from discovering that the article was not a British manufacture. If they were satisfied of the fraud, then the damages were of three descriptions, 1<sup>st</sup>, The sum which he had got by fraud beyond what he paid. 2<sup>d</sup>, Part

GIBB & MAC-  
DONALD  
v.  
WATHEN & Co.

July 11, 1829.

CLELAND  
v.  
MACK.

of the sum the pursuers had laid out in altering their machinery, patterns, &c. 3d, The abatement of price of goods returned to the pursuers. These were fairly considered by the jury, who found L. 4000, which was within the sum proved. In the other case, the counsel on both sides agreed to let a verdict be taken for the defenders, and to deduct the sum of L. 1666, the sum claimed by Sir Paul, from the sum of L. 4000 found by the jury. It appears that the jury followed a sound principle in considering the damages, and were within the sum proved in the accounts. It would, therefore, be unjust to grant the rule to show cause.

*Jeffrey, Cockburn, and Maitland, for the Pursuers.*  
*Hope, Sol.-Gen., Skene, and Whigham, for the Defenders.*  
(Agents, *Ritchie and Miller, s. s. c. Allan and Bruce, w. s.*)

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PRESENT,

LORD CHIEF COMMISSIONER.

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1829.  
July 16.

CLELAND v. MACK.

One shilling damages for defamation.

THIS was an action of damages by a person against his wife's mother for defamation.

**DEFENCE.**—The expressions were not used ; but if they had, they would have been justified by the previous attack made by the defender on the pursuer.

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MACK.



**ISSUE.**

“ Whether on or about the 18th of September 1827, at or near the house of Fruitfield, near Airdrie, and in presence and hearing of the wife of the pursuer, the defender did falsely and calumniously say, that the pursuer was an adulterous scoundrel, or did falsely and calumniously use or utter words to that effect, to the injury and damage of the pursuer.

“ Whether, on or about the 15th October 1827, at or near the said house, and in presence and hearing of John Weir, sheriff-officer, Finlay M‘Intosh, and John Whitelaw, who were then acting as concurrents with the said sheriff-officer, or in presence and hearing of one or other of the said persons, the defender did falsely and calumniously say, that there was no wonder Mrs Cleland, (meaning the wife of the pursuer,) was unwell, or should go mad, being connected with such a villain or rascal, (meaning the pursuer,) or did falsely and calumniously use

CLELAND,  
v.  
MACK.

“ or utter words to that effect, to the injury  
“ and damage of the pursuer.”

*Cuninghame* opened for the pursuer, and  
stated the facts.

Incompetent to  
ask a witness  
what remark he  
made on hearing  
a defamatory ex-  
pression.

A witness was desired to repeat a remark she  
made to another person after hearing the state-  
ment by the defender, but this being objected  
to, the question was given up, the Court at the  
same time intimating that it was not evidence.

In an action for  
slander, incom-  
petent to prove a  
particular in-  
stance of vio-  
lence.

Evidence having been given in chief that the  
pursuer was of a peaceable disposition, the wit-  
ness was asked, on cross-examination, whether  
he ever heard of the pursuer having wounded a  
man with a pair of snuffers?

LORD CHIEF COMMISSIONER.—You may ask  
to general character, but are not entitled to bring  
forward particular facts.

Sommerville v.  
Buchanan, 11th  
February 1801.  
Borth. L. of Lib.  
No. xiii. Inglis  
v. Young, 28th  
Feb. 1801.  
Borth. L. of Lib.  
No. xiv.

*Jeffrey, D. F.* opened for the defender and  
said,—That the impression was against the pur-  
suer, as he had brought this action against his  
mother-in-law, though he was the aggressor.  
That the words being uttered in heat were not  
actionable.

The second issue is not actionable. It is a mere statement of opinion, and does not charge any act.

*Cockburn* in reply.—The points are whether the expressions were used, and whether there have been any observations or evidence to justify or exculpate them? Unless the witnesses are perjured, there is no doubt of the facts, and I will not argue the point that such provocation will take away the right to damages.

CLELAND  
v.  
MACK.

Boyd v. Reid,  
11th July 1801,  
Borth. L. of Lib.  
No. xxiii.

LORD CHIEF COMMISSIONER.—So far as we see this pursuer comes with a fair character, and though it must be the wish of all that no action should be brought between so near relations, still we must deal with it as with any ordinary case, and inquire whether the pursuer has made out one or both of the issues. It is not disputed that, if proved, the words in the first issue are actionable, and there is no attempt to prove the truth. There was no proof of what occurred before this meeting, and you must judge whether the provocation then given justified the words used.

The second is not proved by two witnesses as laid, but there is matter for your consideration.

If you find for the pursuer on the first, you

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LOCH.

will find damages. If on the second still more ; but I trust you will deal with this part of the case with that moderation and propriety which ought in all cases to regulate juries.

**Verdict**—For the pursuer on the first issue, damages 1s. On the second for the defender.

*Cockburn and Cuninghame* for the Pursuer.

*Jeffrey, D. F. and Borthwick* for the Defender.

(Agents, *William Douglas, w. s. William Wotherspoon, s s. c.*)

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PRESENT

LORDS CHIEF COMMISSIONER AND CRINGLETIE.

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1829.  
July 16.

GRAHAM v. LOCH.

Damages by a tenant against an adjoining proprietor for injury done by a dam-dike.

**THIS** was an action by a tenant for the damage done to his farm by a dam-dike, or cauld, erected across a stream.

**DEFENCE.**—No damages can be given till the right to erect the dam is ascertained in a depending process. The damage was not caused by the dam.

ISSUE.

“ It being admitted that the pursuer was



“tenant of the farm of Whiteslade, the property of Thomas Tweedie, from Whitsunday 1822 to Whitsunday 1828; and that part of the said farm is bounded by Biggar Water and Holmes Water, above their junction:—

“Whether, during the year 1823, the defender wrongfully erected a dam-dike or cauld across Biggar Water, lower down than where Biggar Water bounds the said farm, whereby, during the years 1823, 1824, 1825, 1826, 1827, and 1828, or any of them, the said waters, or either of them, did overflow a part of the said farm, to the loss, injury, and damage of the pursuer?”

GRAHAM  
v.  
LOCH.



*Russell* opened for the pursuer, and stated the facts, and that the points to be made out were,—what the defender had done,—that it was productive of injury to the pursuer,—that it was done wrongfully without a title.

An objection was taken to a witness looking at a note which he said he made up from memory the morning of the trial.

LORD CHIEF COMMISSIONER.—The witness can only refresh his memory by a note made at the time.

A witness not allowed to look at a note made by him on the morning of the trial.

*Jeffrey, D. F.* for the pursuer.—I submit

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v.  
LOCH.



that he is entitled to look at a note made by himself, without suggestion, at a time when he would be more cool and collected than at present.

LORD CHIEF COMMISSIONER.—It is unnecessary to argue this on the opposite side. If I am wrong in ruling it as I have done, it is proper it should be altered. The note to which a witness may refer ought to be made at a time when there is no influence on his mind. But if it is made at the distance of a month or a year, it is not made with that freshness which is necessary for correct recollection, nor with the certainty that it is fair and without bias. It is a matter of indifference, in the present instance, from the nature of the fact, but the witness must either speak from recollection or from a writing made at the time.

*Robertson* opened for the defenders, and said, That no damage could be done by this dike. That the only damage proved was caused by the overflow of Holmes Water before it joined Biggar Water. That there was no proof that the erection was wrongful. It was on the property of the defender, and did no damage.

*Jeffrey, D. F.* in reply,—The two questions

are, whether the operations of the defender caused greater floods, and whether these caused damage to the pursuer? Raising the bottom, and narrowing the stream must have caused the floods to rise higher. If we have proved that the land was more and longer flooded, that is sufficient to establish some damage.

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v.  
LOCH.



LORD CHIEF COMMISSIONER.—It appears from the admission and the evidence, that where this dike is built, the property on both sides of the river belongs to the defender; he therefore had a right to build; but this right is limited by the operation of law, which prevents a person from using his property to the injury of his neighbour; and the question is, whether thereby damage was done to the pursuer? In running water, the stream must be allowed to remain the same in quantity and quality, and to run in the same time as it has always done, and a proprietor cannot erect a new work to the injury of his neighbour. The questions in this case are, whether this work has produced the effect on the stream, and whether this effect produced damage to the farm?

You must apply your good sense to the facts proved, as to the state of the two streams, the situation of this farm, the nature of the ope-

TAILORS OF  
ABERDEEN  
v.  
MUNRO, &c.

ration (all which his Lordship described) and then say whether the damage was caused by this operation? If you think it was not, you will find for the defender.

The damage in the schedule is not fully proved, which shows a grasping disposition on the part of the pursuer; but some damage was done to the wheat and hay, and you must consider whether it was done by the regurgitation produced by this dam; but the defender ought not to suffer from the inaccurate proof of the damage by the pursuer.

Verdict—"For the defender."

*Jeffrey, D. F.* and *Russell* for the Pursuer.

*Robertson* and *W. Bell* for the Defender.

(Agents, *John Cullen*, w. s. *Dickson* and *Stewart*, w. s.)

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PRESENT,

THE LORD CHIEF COMMISSIONER.

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1829.  
July 17.

INCORPORATION OF TAILORS OF ABERDEEN  
v. MUNRO and GRANT.

Declarator of the exclusive privileges of an incorporation, and damages for infringing that right.

THIS was an action of declarator and damages, to have it found that the Members of an Incor-

puration had the exclusive right of exercising the trade within Burgh, and that the defenders were liable in damages for infringing the privileges of the corporation.

TAILORS OF  
ABERDEEN  
v.  
MUNRO, &c.  


DEFENCE.—The defence insisted on was, that Munro was a King's freeman by having served in the army, and was entitled to assume an unfreeman as a partner, and employ journeymen.


#### ISSUES.

“ It being admitted that the pursuers are the  
“ Deacon and Members of the Incorporation  
“ of Tailors in the city of Aberdeen :

“ Whether, at several times, between the  
“ 2d April 1824 and 2d April 1828, in vio-  
“ lation of the privileges granted to said Cor-  
“ poration, the defenders, or any of them, by  
“ themselves, or their workmen, wrongfully ex-  
“ ercised the trade of tailors within the said  
“ city, or liberties thereof, to the loss, injury,  
“ and damage of the pursuers ?”

*Neaves* opened for the pursuer and stated, That the privilege of the incorporation being admitted, the fact the pursuers had to make out, was, that the defenders exercised the trade

TAILORS OF  
ABERDEEN  
v.  
MUNRO, &c.



within Aberdeen. Munro is not personally capable of carrying on the trade, and his partner is not a freeman. They are not therefore entitled to employ servants to make clothes for sale. The act was intended to enable a soldier, who supported himself by his own personal labour, to exercise his trade within any burgh, but he must be apt and fit, and not use his privilege merely as a cover to others.

LORD CHIEF COMMISSIONER.—Was not this decided the other way, and if so, would it not be better to admit the fact, and take a bill of exceptions to my direction.

*Cockburn.*—We do not admit the fact, and shall prove him expert.

*Skene.*—The point which occurs in this case was never decided.

*Neaves.*—The defender was unfit during the period of which we complain, though he may have made some attempts to qualify himself during the dependence of this action.

Though he were apt and able, and entitled to practise the art, it is a personal privilege, and he is not entitled to communicate it to another.

An objection being taken to the production of an account paid to the defenders,

Tailors of Glasgow v. M'Kech-  
nie, March 1777.  
Mor. 2014, and  
Ap. Burgh R.  
No. 3; Ham-  
mermen of Glas-  
gow v. Dunlop,  
18th Feb. 1757.  
Mor. 1950;  
M'Ewan and  
Ferguson v.  
Davidson, 27th  
June 1816.  
Shoemakers of  
Perth v. Martin,  
24th Feb. 1790.  
Mor. 2014 and  
2 Hailes' Dec.  
1079.

LORD CHIEF COMMISSIONER.—You must prove it.

TAILORS OF  
ABERDEEN  
v.  
MUNRO, &c.

An extract of a sentence of the Dean of Guild Court was afterwards tendered.


*Cockburn.*—This is not an extract, and is irrelevant. It is merely a narrative by the clerk of what he thinks the substance of a judgment imposing a fine on the defender as not a free-man.

Evidence must be confined to the issue, not to the condescendence or pleas in law.

*Skene.*—They aver that he is a burgess, and upon this ground a plea in law is stated; and we produce this to disprove the averment.

LORD CHIEF COMMISSIONER.—We are not here trying the pleas in law, or averments in the condescendence, but the issue, whether they wrongfully exercised the trade? and, though it is right to draw the attention of the Court to the averments and pleas, yet the evidence must be confined to the issue. It would be wild work were we to admit evidence to meet every averment or plea. When the issue is settled, it contains the question to be tried; and it must be shown, that it is evidence on that question. What is tendered is clearly not evidence,—it is on another matter in a different Court. If the fact is material, it must be prov-

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ABERDEEN  
v.  
MUNRO, &c.



ed regularly, and not by an extract, whether regular or irregular.

A witness was asked whether it was consistent with his knowledge that Munro was, or was not, apt and fit for the business of a tailor.


*Cockburn*.—We hold this irrelevant.

LORD CHIEF COMMISSIONER.—Might not a special verdict or special case be the best way of disposing of this question. In England, when a case is taken, it is necessary to have leave to turn it into a special verdict if it is intended to carry it to a higher tribunal on a writ of error; but this distinction does not hold here, and the advantage of a special case is, that the jury are not called on to find any thing, but it is made up by counsel of consent from the notes of the Judge. In either case the object is to state what will raise only a question of law. They must contain facts, from which no conclusion is to be drawn by the jury, but by the Court. This appears to me such a case, and I shall state my views of it, and counsel will be able to judge whether the case can be so disposed of.

The question is, whether, under the terms of the statute, “apt and fit,” a person of the



description of Munro, who is proved to have his freedom by service, is bound by law to be apt and fit. What it is to be apt and fit must be decided by the statute and the cases. The jury must find on this according to my direction, and I am not sure that there is any conclusion for the jury to draw, except according to the law that may be stated to them by the court. I might say according to the opinion of the witness, that skill in the profession was necessary. But, if what I have proposed is adopted, then, instead of the jury finding this, they will merely find for the pursuer, subject to the opinion of the court on a case to be made up. As to damages, I consider that matter of form.

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v.  
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The counsel on both sides assented to the propriety of this mode of settling the case.

Verdict—"For the pursuers, subject to the  
"opinion of the Court of Session on a special  
"case."

*Skene and Neaves*, for the Pursuers.

*Cockburn and Moir*, for the Defenders.

(Agents, *Carnegy and Shepherd*, w. s. and *Enca's Macbean*, w. s.)

MILES  
v.  
FINLAYSON, &c.

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PRESENT,

THE LORD CHIEF COMMISSIONER.

1829.  
July 17.

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MILES v. FINLAYSON, &c.

Damages for assault and forcibly turning the pursuer out of his school and house.

THIS was an action of damages by the teacher at a manufacturing establishment against the manager of that establishment and others, for assault and forcibly turning him out of the school, and house.

DEFENCE.—The conduct of the pursuer warranted the means used for his removal.

ISSUES.

“ It being admitted that the pursuer was the teacher of a school at the Ballindalloch Cotton-Works in the month of September 1828 :

“ Whether, on or about the 10th day of September 1828, the defenders, or any of them, did violently assault the pursuer, or cause him to be assaulted, or did wrongfully enter the said school-house, or did wrongfully cause the pursuer to be taken by violence from the

“ said school-house, to the loss, injury, and damage of the pursuer ?

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v.  
FINLAYSON, &c.

“ Whether, on or about the said 10th day of September 1828, the defenders, or one or other of them, did wrongfully take possession of, or cause to be taken possession of, and wrongfully detain, or cause to be detained, certain articles, the property of the pursuer, or which were in the custody of the pursuer, to the loss, injury, and damage of the pursuer ?”

*Russell*, in opening the case for the pursuer, said, That the assault was the leading point. That, even if there had been a right to dismiss him, it was done precipitately, and nothing can justify the assault.

An objection was taken to the pursuer leading any evidence as to the nature or duration of his engagement, the issues being for assault and detaining property.

*Jeffrey, D. F.* for the pursuer.—This objection is premature. We cannot get a verdict on the length of the term of engagement, but are entitled to prove it to meet their statement, that the engagement was a precarious one, and to show that the pursuer had reasonable ground to think it permanent.

In an action for assault and forcibly turning the pursuer out of his school and house, competent to prove the terms on which he entered, though not competent on the assault.

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v.  
FINLAYSON, &c.



LORD CHIEF COMMISSIONER.—I am of opinion that the objection is too narrow, but that, on the other side, the statement is too broad. The way to view this is to look at the issue, and consider what is the defence stated in the pleadings. The first issue contains two points—the assault and wrongful entry of the school. As to the assault, no justification is pleaded, and, therefore, the defender must rest on a proof of the *res gestæ* in diminution of damages. But, on the second point, it is material to prove the situation in which the pursuer stood, and the conditions on which he entered the school. On the second branch of the first issue you are entitled to prove the manner in which he entered, and the right he had to be there ; but this is not to be carried farther, or applied to the assault.

When certain certificates by the leading defender approving of the manner in which the pursuer taught his school were produced,

LORD CHIEF COMMISSIONER.—His situation and character are important on an issue for assault and turning the pursuer out of school ; but it is difficult for the Court to regulate this sort of evidence, and it must trust to the discretion of counsel.

When a question was afterwards put as to the opinion a witness entertained of the character of the pursuer, his Lordship said he was afraid the questions were becoming irregular.

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v.  
FINLAYSON, &c.  


*Cockburn* opened for the defenders, and said,—We are entitled to the protection of the Court, as the pursuer has employed the usual trick of calling as defenders all those who could have been witnesses. It is also impossible for us to prove the property of the pursuer, which was put into boxes in the house, except by the persons who put it in. On the showing of the pursuer we are entitled to have some of the defenders liberated.

Where there are several defenders the Jury may find for one of them that he may give evidence for the others.

**LORD CHIEF COMMISSIONER.**—You are entitled to address the jury, and it is they alone who can protect you, and not the Court. By the evidence, the defenders have all been ushered into the house. If a clear case had been made out, and some of them had not entered it, I would have said plainly that they ought to be liberated; but the case is very different here, and, so far as we have yet heard, is made out against three of the defenders, and even the others are proved to have gone a certain length, and to have taken the lock from the

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door. Three of them must stand defenders till the last. A fourth was more active than the others; but they all went within the outer door, and it is not proved which of them acted in the room. In these circumstances, I shall put it to the jury to say whether they were all parties to the assault, or whether some of them are so clear that a verdict may be returned for them? It is a great hardship when all are included who can be witnesses; but in this case there was an original presumption against the whole.

The jury would not acquit any of them at this stage of the case.

*Cockburn*, (to the Jury.)—The pursuer acted in such a manner as was inconsistent with good discipline, and would have justified his immediate dismissal, but he got warning. A servant is bound to remove when ordered, but has his redress if injured. The pursuer prepared to resist the lawful orders of the proprietors, and the manager used no more force than was necessary to carry these orders into effect. By making all who were present defenders, he has deprived us of the means of proving that he was the party guilty of assault.

On the other part of the case, the pursuer

was frequently invited to take his things, but preferred an action.

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v.  
FINLAYSON, &c.

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*Jeffrey* in reply.—It is said we called as defenders all who were present, but we only called those who were parties to an illegal act. There are direct acts proved against them all, with one exception, and he aided by his presence. The question is, whether the pursuer was cruelly and wantonly assaulted, and excluded from a situation where he had a legal right to be? and there is an end of all law and decency if such acts are tolerated.

LORD CHIEF COMMISSIONER.—It is necessary to approach this case with cool and deliberate minds, and free from prejudice on either side. The case is entirely with you, but from the manner in which it has been treated at the Bar, it becomes more necessary for me to make some observations. All being called who were present is hard on the defenders; but though it would have been desirable to have had the evidence of an eye-witness, still no blame attaches to the pursuer, as there is a *prima facie* case against them all.

The assault rests entirely on presumptive evidence, as the only direct evidence is of their

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FINLAYSON, &c.



bringing him down and out of the house, which no doubt would be an assault ; but then it commenced in the school ; and an assault may be justified by saying the pursuer assaulted first, or gave provocation, and his conduct may have been such that he ought to go without damages. You will, in weighing the presumptions, consider the state of mind in which each party was previous to their meeting in the school,—the causes of irritation on both sides which have been proved—the intention with which the defenders came,—and the threats of resistance by the pursuer.

In this state the defenders enter the school-house, and though I do not say the house was given over to the pursuer, so that they had not a right to enter, still they ought to have done so with as little violence as possible. The dragging the pursuer from the school impresses the mind with the belief that there had been violence before, and a certain degree of violence by the pursuer might have taken away his right to damages ; but his having first assaulted cannot be stated as a *defence*, as it is not on record.

On the second part of this issue—the entering the school—I cannot tell you that this is in the situation of a dwelling-house which is a man's castle. This was not a parish school, but



a place given for the performance of a certain duty. I cannot say that it was so given as to exclude the giver; on the contrary, they are entitled to see the school, and, if excluded by bolts and locks, they are entitled to enter by forcing them open. On this part, therefore, I cannot say that they wrongfully entered, and that you ought to find for the pursuer; but, on the other hand, I cannot think that such a person is to be put on a footing with day-labourers, or even a clerk, unless the terms of the agreement are very clear indeed. The true course in such a situation is to apply to the law, but here a different course was pursued. If the case depended on the defenders entering the school, I should think the pursuer wrong; but in my opinion there is enough to warrant a verdict on the latter part of the issue, and you will consider the facts proved as they bear upon the question of the original assault.

On the second issue, I think there is no reason to doubt that the articles were in the school, but the pursuer got warning to remove them, and after they were taken he got notice where they were. He was, however, contumacious, and would neither remove them before, nor take possession of them after. If, however, you think it proved that they were taken from

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TRUSTEES, &c.  
v.  
WHITE.

him, you will find for the pursuer; and, on the whole case, you will give such moderate damages as you think an indemnity for what he suffered.

Verdict—"For the pursuer, damages L.200."

*Jeffrey, D. F.* and *Russell*, for the Pursuer.

*Cockburn* and *Ivory*, for the Defender.

(Agents, *John Cullen*, w. s. and *Gibson-Craigs & Wardlaw*, w. s.)

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PRESENT,

THE LORD CHIEF COMMISSIONER.

1829.  
July 18.

GRAHAM'S TRUSTEES, &c. v. WHITE.

Finding for the defender on an issue whether, at the time two bonds were assigned to him, he knew that they were granted for money lost at play.

THIS was an action by the defender, White, for payment of the sums contained in two bonds, or for repayment, with interest, of the sums given by him for these bonds.

DEFENCE.—The bonds were granted for money lost at play.

ISSUE.

" It being admitted that the pursuer, Charles  
" Ferrier, is trustee on the sequestrated estate

“ of John White, late merchant in Edinburgh,  
“ and that the defenders, James Brown and  
“ Edward M’Millan, are trustees on the estate  
“ of the defender, William Cunninghame Cun-  
“ ninghame Graham of Gartmore, Esquire :

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TRUSTEES, &C.  
v.  
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“ It being also admitted that, on the 21st  
“ day of May 1810, the late Sir John Lowther  
“ Johnstone, Baronet, granted to the said Wil-  
“ liam Cunninghame Cunninghame Graham  
“ two bonds in the English form, the one for  
“ the sum of L. 4000 Sterling, voidable on  
“ payment of the sum of L. 2000 on the 21st  
“ day of May 1813 ; the other also for the sum  
“ of L. 4000 Sterling, voidable on payment of  
“ the sum of L. 2000 Sterling on the 21st of  
“ May 1814 :

“ It being also admitted that, on the 22d  
“ day of January 1811, the said John White  
“ obtained right, by an assignation, to the bond  
“ first mentioned ; and, on the 1st day of May  
“ 1811, obtained right, by an assignation, to  
“ the said last mentioned bond :

“ It being also admitted that, by an interlo-  
“ cutor in this action, dated 6th July 1819,  
“ the trustees of the said Sir John Lowther  
“ Johnstone were assoilzied, on the ground  
“ that the said bonds had been granted by the  
“ said Sir John Lowther Johnstone for money

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“lost to the said William Cunninghame Cunningham Graham at play, contrary to the statute 9th Anne, and that, in a process of reduction at the instance of Sir John Lowther Johnstone’s trustees, against the said John White, the said bonds were found to be void and null.

“Whether, at the time the said bonds, or either of them, were assigned as aforesaid, the said John White knew that the said bonds, or either of them, were granted by the said Sir John Lowther Johnstone to the said William Cunninghame Cunningham Graham for money lost at play as aforesaid?”

*Cockburn* opened for the pursuer, and said, The late Sir J. Johnstone lost money to Mr Graham at play. An action was brought against Sir John’s trustees, in which their defence was sustained, and the bonds found to be null. White now claims the money from the trustees of Mr Graham; to which their answer is, you knew these bonds were for game debts, and if you interfere with gamblers, you buy such bonds with all their risks. White’s knowledge is the question here, and though we may not be able directly to prove it, we say from the circumstances he must have known, as he was involved in these transactions to the extent of L. 23,000.

An objection was stated to a witness reading a letter which had not been produced.

**LORD CHIEF COMMISSIONER.**—The course in such a case is perfectly understood. If a witness is called to speak to facts, and can refresh his memory by a letter or note made at the time, he may speak to the facts by reference to the letter or note.

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v.

WHITE.

A witness may refresh his memory by reading a letter written by him, though not produced before the trial.

*Hope, Sol.-Gen.* opened for the defender.—The case of the pursuers has completely broken down, and they have preferred resting their case on suspicion or indirect evidence, to calling those who knew the facts.

Direct evidence, and not mere suspicion, is necessary to warrant a Court or Jury in finding that a person knew that bonds were granted for money lost at play.

**LORD CHIEF COMMISSIONER.**—In cases of this sort clear legal evidence is necessary coming home to the transaction, but here we have only letters and witnesses mentioning the subject indirectly, and stating generally the condition and habits of these parties. This is not evidence which can warrant a Court in directing, or a jury in finding, that this was known to the defender. Suspicion is not a ground on which you can find.

The jury having stated that they did not think it proved, but that they were satisfied

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that White could not have been ignorant of the nature of the transaction,

*Jeffrey, D. F.*—If this is not a case to go to the jury, we wish the ground why it is withdrawn from them to be embodied in a proposition of law. They state that they are satisfied of it, and whether the evidence is direct or indirect is of no consequence.

LORD CHIEF COMMISSIONER.—As they are of opinion that it is not proved, they cannot find for the pursuer. If they found a verdict on their impression, when they think it not proved, it would be set aside, as contrary to law. But I shall state my views to the jury. The issue is, whether White knew that the bonds were granted for money lost at play? and to entitle you to find that he did, you must be satisfied by legal evidence, laid before you, that he knew it at the time of the assignation. The documents show the familiarity of intercourse between Mr Graham and the defender, and in one letter allusion is made to bonds; but there is nothing in the letters showing that he knew that the bonds were granted in a gambling transaction. To aid this, witnesses were called who knew nothing of this particular transaction, but who state generally that it was notorious

that the parties gambled, and that bonds were granted in consequence of reference to arbitration. But no knowledge of that is brought home to the defender at the time of the transaction. There is also evidence of the intimacy of Graham and the defender, and of the money being advanced for the payment of his debts, but there is no evidence that these were gambling debts.

GRAHAM'S  
TRUSTEES, &c.  
v.  
WHITE.  


The question for you to consider is, whether the pursuer has proved his case, and, if not, then the regular course is to find for the defender? If this is wrong, a motion may be made for a New Trial, and then all the Judges will have an opportunity of considering the matter with more deliberation. It would be extremely dangerous if a jury were to decide on their belief of the facts, if that belief is not supported by evidence. If this direction contains a proposition of law, which I think it does not, the party may have his redress, and I have followed this course, as the Solicitor-General said he did not intend to lead evidence.

*Jeffrey.*—The direction I understand to be, that if there is no legal evidence of a fact, it is dangerous to go on belief or suspicion impressed on their minds by circumstantial evidence.

CADZOW  
v.  
WILSON.

**LORD CHIEF COMMISSIONER.**—I think they are not entitled to find a fact, when they state that they think it not proved.

**Verdict—For the defender.**

*Jeffrey, D. F., Cockburn, and Spiers, for the Pursuer.  
Hope, Sol.-Gen. and Forsyth, for the Defender.  
(Agents, Walter Cook, w. s. and Lockart and Swan, w. s.)*

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PRESENT,

LORDS CHIEF COMMISSIONER, AND MACKENZIE.

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1830.  
Jan. 4.

CADZOW v. WILSON.

Finding that the defender was indebted to the pursuer in a certain sum as the balance of the price of a property.

**THIS** was an action to recover the balance of the price of certain property sold by the pursuer to the defender.

**DEFENCE.**—The pursuer failed to put the defender in possession of seven acres of the property sold, containing a lime-quarry, and has not given, and cannot give, a sufficient title.

ISSUES. \*

“ Whether, in the year 1809, the pursuer

The want of a stamp, though not insisted in by the party, renders a document inadmissible.

\* This case was originally set down for trial on the 18th July 1829, and opened by the counsel for the pursuers, but



“ sold for the sum of L. 980 Sterling, and put  
 “ the defender in possession of, certain houses

CADZOW  
 v.  
 WILSON.

the missive not being stamped, the Court held that the case could not proceed, as they were bound to protect the revenue when the subject was brought to their knowledge, even though the party did not insist in the objection. The parties consented to the jury being discharged, and agreed, on the suggestion of the Court, that the expenses should abide the event of the suit.

When the defender moved for expences,

Nov. 24, 1829.

*Murray* objects.—This was the fault of both parties.

*Cockburn* and *Aytoun*.—The Court ordered the jury not to return a verdict ; and in a similar case at Glasgow, where a party got a verdict, the Court refused costs, as the objection of the want of a stamp was held a surprise.

Park's Pr. K. B.  
 and C. Pl. 161.  
 Tidd Pr. 936.  
 Hullock's L. of  
 Costs, 396.

LORD CHIEF COMMISSIONER.—The question at present is, Whether this shall go to the auditor on a general order for expences ? and I shall consider it first on principle, and then on the cases. It was no fault of the party claiming, that the jury did not give a verdict ; and it is not a sufficient excuse for the pursuer, that this case passed through the ordeal of the Court of Session, and the clerks and Court here, without the objection being discovered. When it is produced, the Court must take the objection ; and I cannot say it is hard on the pursuer, as the defender must have had a verdict. If I had had the power to nonsuit, (which must at some time be given to the Court,) I would have nonsuited the pursuer ; but not having this power, I suggested withdrawing a juror : but this must be considered as a nonsuit.

2. On the cases Tidd is quite right, as the new trial was given by agreement ; but in the general case, the rule would be different. This case ought to be regulated by the principle of nonsuit, and the justice of the case ; and on these principles the defender ought to get the costs of that day, allowing the

CADZOW  
v.  
WILSON.  


“ in Kilncadzow, and lands in the neighbour-  
“ hood thereof, in terms of the missive letters,  
“ No. 6 of process ?

“ Whether the defender is indebted and rest-  
“ ing owing to the pursuer in the sum of  
“ L. 600, or any part thereof, with interest  
“ thereon from the 17th day of June 1809, as  
“ the balance of the price of the said houses  
“ and lands ?”

*Aytoun* opened for the pursuer and said,—  
The pursuer sold thirty acres of ground to the  
defender, and it was agreed that if he succeeded  
in reducing a perpetual lease of seven acres  
more and a quarry, that they also should be  
conveyed. He did not succeed in the reduc-  
tion, and on that ground the defender refuses  
to pay L. 600 out of L. 900, though the pur-  
suer knew the circumstances and got possession  
of the quarry, the tenant not having taken

Ersk. B. 2, T. G.  
§ 25.

other costs to remain to the end of the case. If a verdict had  
been given for the defender, the pursuer might have got a new  
trial, but it would have been on payment of costs.

LORD MACKENZIE.—I am of the same opinion.

The Court afterwards held that half the expense of stamping  
the document ought to be deducted from the sum claimed by  
the defender.

possession of it. He has homologated the transaction by pulling down houses.

CADZOW  
v.  
WILSON.

When the second witness was called,  
*J. A. Murray*, for the defender.—The daughter of the witness was married to the pursuer, and the relation having once been constituted, the objection is good.

*Cockburn*.—This is a necessary witness, and the relation was dissolved ten years before the date of the deed. The case relied on is a solitary decision, and there is no principle supporting it, besides it was not a direct decision on this point.

A father, after the death of his daughter, inadmissible as a witness for her husband.  
*Humphrey v. Aitken*, 18th Feb. 1822. 1 Sh. Cases H. of L. 111.

**LORD CHIEF COMMISSIONER.**—We have had an agent admitted after he ceased to be agent, and my disposition was to dispense with the objection founded on relationship, but I am tied up by the law of Scotland, and by this decision, which affirms the interlocutor of the Court of Session, which specially finds the witness inadmissible.

Another witness having stated that, at a meeting of the parties, Cadzow offered to take back the land. The Lord Chief Commissioner said this was not the way to prove a compromise.

Evidence of what the pursuer said at a meeting of the parties, inadmissible to prove a compromise.

CADZOW  
v.  
WILSON.



*J. A. Murray* opened for the defender.—The pursuer says that he has fulfilled the bargain, or that, if he has not given full implement, the defender knew the deficiency. He admits he must give a feudal title to the seven acres, and this will turn out to be a question as to their value. If it had been intended to except them from the bargain, it must have been done expressly. They are not entitled to compound interest.

LORD CHIEF COMMISSIONER.—If you consent to a verdict, the jury may find a sum with interest, leaving it for discussion what the rate should be ; but unless you admit that a certain sum is due, there is no ground for the arrangement.

Circumstances in which a bill of advocacy containing an interlocutor of a Sheriff, was received as evidence of the terms of that interlocutor.


To prove an interlocutor of the Sheriff in a question for removing the tenant of the seven acres, the pursuer proposed to produce a bill of advocacy in which it was quoted.

*Cockburn* objects,—This is not the best evidence. The original interlocutor must be produced.

*J. A. Murray*.—We give in the proceedings in the Court of Session, which contain their statement of the interlocutor, and any statement by them is evidence against them.

**LORD CHIEF COMMISSIONER.**—The question here is, How far the evidence tendered is admissible ; and though I agree that the best evidence must be given, yet there may be solemn acts of a party which may render this unnecessary. If the advocacy had stood alone, the original proceedings must have been produced, but there is an act of the pursuer admitting the interlocutor. The proceedings, as now offered, ought to be admitted, and the interlocutor being correct, may be held as proved ; the pursuer, by his judicial acts, having rendered it unnecessary to look for higher evidence ; but we do not, by admitting the proceedings, hold that you are entitled to read every part of them.

CADZOW  
v.  
WILSON.



**LORD MACKENZIE.**—I agree, especially as the object is to show the proceedings in the Court of Session.

A plan not having been produced eight days before the trial, was rejected, and also a witness, who was married to a niece of the defender.

*Cockburn*, in reply, said, This is a selfish, paltry, and improper case, in which the defender keeps possession both of the property and the price. We do not know whether the defender holds the previous right to the seven

A plan must be produced eight days before the trial. The husband of the pursuer's niece rejected as a witness.

CADZOW  
v.  
WILSON.



acres good or bad, but if he holds it a lease, the answer is, he knew it at the time of the purchase,—if an alienation, then he did not purchase these acres. The lime-quarry is the only valuable part of the seven acres, and that is in the possession of the defender, who drained his other quarries through it. We have offered, and now offer, L. 50 of deduction, but hold that we are entitled to compound interest on the balance due.

LORD CHIEF COMMISSIONER.—The burden of proving the first issue is on the pursuer; and this leads to the consideration of what is sold. By the missives the pursuer sells all his lands and houses, and he puts the defender in possession of thirty acres in different places, who pays L. 380. A question arises as to whether other seven acres and a lime quarry were sold.

The sale is made out by the evidence, and the defender was put in feudal possession. If he was also to be put in actual possession, then you must fix the value. If you think it ought to be more than the L. 50 offered, perhaps you may be disposed to take L. 75 as the average between that and twenty-five years' purchase of L. 4, which was stated as an estimated rent.

As to the quarry, if the defender used it for draining his other lime-rock, then there can be no deduction for the want of it.

CADZOW

v.

WILSON.



The proof of the second issue rests on the defender ; and the question is, Whether he is to retain the L. 600, or any part of it, on account of the non-delivery of the seven acres and the lime-rock ? With regard to the lime-rock, there is no distinct evidence whether it was under lease at the time of the sale or not ; but the defender has not brought evidence to meet what was proved as to the draining the other quarries through this. In these circumstances, you may safely hold that it was part of the transaction, and that he has got possession, and that no deduction should be made for it. The evidence is so vague, that it is impossible to get at any thing very satisfactory to the mind ; but, on the whole, I think you may find for the pursuer on the first issue, and also on the second, subject to such deduction as you think the value of the seven acres, unless you think the defender at the time knew the situation in which they were.

As to interest, we are both of opinion that compound interest ought not to be given ; and that it would have required a *direction* by the Court of Session, which would have been transferred to the issue to entitle you to give it.

M'DOUGALL

v.

WIGHTON.



Verdict—" For the pursuer, and that the  
 " defender is indebted to the pursuer in the  
 " sum of L. 540, with interest from 17th June  
 " 1809."

*Cockburn, Rutherford, and Aytoun, for the Pursuer.*

*J. A. Murray, Jameson, and D. Dickson, for the Defender.*

(Agents, *Aytoun and Greig, w. s.* and *James Lang, w. s.*)

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PRESENT,

LORDS CHIEF COMMISSIONER, PITMILLY, AND MACKENZIE.

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1830.

Jan. 5.



M'DOUGALL v. WIGHTON.

Finding as to  
 the manner in  
 which a bond of  
 caution was sub-  
 scribed.

THIS was a reduction of a bond of caution by one of three cautioners, on the ground, that the instrumentary witnesses did not see the principal party, or the other two cautioners sign, nor did they hear them acknowledge their subscription.

DEFENCE.—The pursuer homologated the bond, and promised payment. The principal party delivered it as a true document ; and the pursuer does not deny his own signature.

ISSUE.

" It being admitted, that James Cameron,



“banker in Dunkeld, was elected trustee on  
“the sequestrated estates of Martinsons and  
“Sommerville, and that he offered, as his  
“cautioners, James Stevenson and John Duff,  
“merchants in Dunkeld, and the pursuer, the  
“late Hugh M'Dougall.

M'DOUGALL  
v.  
WIGHTON.



“It being also admitted, that the bond of  
“caution, No. 1-3 of process, bears to be sub-  
“scribed by the said James Stevenson, John  
“Duff, and the late pursuer, Hugh M'Dou-  
“gall.

“Whether the said bond is not the deed of  
“the late pursuer, Hugh M'Dougall?”

*Forsyth* opened for the pursuer.—The ground of reduction is not that the signature is not genuine, but that the party was misled by one for whom the defender is answerable. The deed was laid before the pursuer by the agent of the defender as a true deed subscribed by three parties; but it turns out that one of the subscriptions is forged, and the other two were not regularly attested. The Court of Session were of opinion, that, if this was the fact, then I was entitled to succeed.

LORD CHIEF COMMISSIONER.—The Court are clear, that, to render a deed probative, the

M'DOUGALL

v.

WIGHTON.



subscription must be seen by the witnesses, or the party must acknowledge it to them. It appears to me that this case results in a pure question of law, how far the other parties, not having signed, or their subscriptions not being regularly attested, relieves the pursuer from his obligation. Would it not be better to have it tried on a special case?

The facts being disputed by the defender, the case proceeded.

Circumstances in which a party was entitled to prove a fact not directly stated in the record.

The clerk of the agent having stated that he took the bond to the pursuer to be signed,

*Cockburn* for the defender.—If they mean to prove mistake, this is surprise, as there is nothing of this on record. The plea there is, that the pursuer was misled.

*Hope, Sol.-Gen.*—This is no part of my case, but I am entitled to prove the *res gestæ* to meet their defence. There is no surprise.

*Cockburn.*—The objection is important and well founded. The case is brought and was opened to the jury as one where the party was misled, not mistaken.

LORD CHIEF COMMISSIONER.—In this case the issue is a general one, and in all general issues

surprise is a good ground for rejecting evidence, as the only defect of a general issue is, that the party may be entrapped by surprise. From the course here taken, and from the manner in which the objection is brought forward, there is enough to show that there is no surprise ; on the contrary, it is clear that it has been matter of previous consideration that the cause would take this course. The issue is sufficient to admit it, and the question is, whether there is a substantial objection to the evidence ? The intention here is to get at the question of law, and the evidence is to be laid before the jury to get the facts necessary for that question. If the facts are to be stated in a special case, then the first thing would be the bond and the testing clause, and it is necessary to have all the facts clearly proved whether they are to be in a case or in a general finding on the direction of the Judge.

This evidence is by anticipation, and, as the pursuer undertakes the proof in this form, it would be improper to impede him in doing so. If we exclude this, how might the case stand ? There may be evidence of the signature of the deed, the truth of the subscription, and that the witnesses saw it subscribed, and if this is excluded, you leave out a part of such impor-

M'DOUGALL  
v.  
WIGHTON.  


M'DOUGALL  
v.  
WIGHTON.

tance as to render all the rest abortive. The evidence goes purely to the situation in which Mr Duncan, the agent, stood, and to prove that he was agent not of the party who signed the bond. It is admitted not on the ground of fraud or misleading, but that the pursuer is entitled to prove the character in which the agent acted in reference to this bond.

LORD PITMILLY.—I was not aware that this case was to be tried to-day, or I would have looked more into it ; but this point of the agency was one on which in the Court of Session we wished for information. If there is surprise we must yield to it ; but we must be very strict as to records if we hold this evidence excluded. The question appears to me sufficiently raised by the third plea, and I have no notion of thus narrowing the point.

But not allowed  
to prove matter  
not there stated.

An objection was afterwards taken to the question, whether any communication was made by the witness to the agent relative to the subscriptions of the other witnesses ?

LORD CHIEF COMMISSIONER.—If the answer tends to prove misleading, I am clear that it is not within the object of inquiry.

It is clear that the whole of this leads to a

pure question of law, on which the jury must take the direction of the Judge, or find a special verdict, or find in terms of a case to be drawn up. They are not to consider any thing as to deception.

M'DOUGALL  
v.  
WIGHTON.  


The jury have only to find formally, as there is no fact on which they can find generally for the pursuer. The questions for them are, Whether the deed was regularly executed? Whether Stevenson wrote his name? and Whether Mr Duncan was agent for the trustee and creditors, (which was afterwards admitted?) The only points on which there is any contrariety of evidence is the regularity and genuineness of the signatures. It is for the Court to say, whether there is an immunity to the pursuer from liability, on account of what is proved as to the signatures of the others.

At the close of the evidence for the pursuer, it was stated that engravers were cited for each party, but that they had consented not to call them on either side, which was approved of by the Court.

By consent of parties, engravers not called as witnesses on either side.

*Cockburn* opened for the defender.—The two facts to be tried are, whether Stevenson's name is forged, and whether, if genuine, it is regularly attested?

M'DOUGALL  
v.  
WIGHTON.

Condie v. Buch-  
an, 26th June  
1823. 2 Sh. and  
Dun. 432.  
E. of Fife's Tr.  
v. E. of Fife, 3  
Mur. Rep. 504.  
Smith v. Bank of  
Scotland, 25th  
January 1821.

On the first point, one witness for the pursuer believed it to be his; and we shall call others who will swear that it is his. On the second point, you must take direction from the Court as to the forms necessary, and the grounds on which a deed may be cut down. The act 1681 contains the whole law on the subject, and by it the witnesses must see the subscription, or hear it acknowledged. There is no case in which a deed has been cut down on the oath of the instrumentary witness alone, as this would make the most regular deed depend on the oath of a person coming to swear against his attestation. Law presumes in favour of a regular deed, and each fact requires two witnesses. The Court ought not to allow this part of the case to go to you, as there is only one witness as to Stevenson, and one as to Duff, and these witnesses in suspicious circumstances.

**LORD CHIEF COMMISSIONER.**—Lord Eldon has in many cases laid it down that he would not rely on the testimony of a person who comes to disaffirm his act, and so solemn an act.


*Hope, Sol.-Gen.* in reply.—I do not mean to trouble the Court with any law as to the execution of deeds; but on the case of *Condie I*

would observe, that the opinion given is merely that the evidence of the witness, in the circumstances of *the case*, is not sufficient, and clearly in that case it was not sufficient.

M'DOUGALL  
v.  
WIGHTON.  


In the present case it is not the fault of the pursuer that there is not other evidence to lay before you, and the evidence which has been given is both admissible and admitted; and, therefore, unless the Court tell you that you are not to consider it, you must say whether you believe it. Duff and Stevenson neither signed in presence of the witnesses, nor acknowledge that they had signed; and the witnesses prove that they were not witnesses to the signature of either of them, though the deed states them to be so.

LORD CHIEF COMMISSIONER.—You may dismiss from your mind the general question raised in the cause, and even the question put in the issue, as this case has reduced itself to a question of law arising out of the facts proved in the course of the cause. You may also free your minds from all the facts, except as to two points, the forgery of the name of James Stevenson, and the attestation of the deed in presence of the instrumentary witnesses, or acknowledgment to them. These are the facts dis-

M'DOUGALL  
v.  
WIGHTON.  


puted by the parties upon which you are to find, and it is unnecessary to distract your minds by stating the question of law.

The forgery depends on the proof as to the handwriting. Evidence on this subject of handwriting differs from the general principle of the law of evidence, as here, unless the witnesses saw the words written, which is seldom the case, they speak merely as to their belief. The Bar have in this case wisely abandoned a species of proof by engravers, which has been brought in other cases. Proof of handwriting ought to be by those who know it either from having seen the party write, or from having corresponded with him, by which they acquire a knowledge of the writing similar to that which we acquire of the face of an acquaintance. The instrumentary witnesses did not see him subscribe ; it is therefore possible that the signature was imposed on them. You are to consider, however, whether there is not pregnant evidence that the witnesses believed it genuine. You are to say yes or no, whether you consider it genuine or a forgery, or fabrication.

As to the regularity of the execution, you have only to consider the fact, not the effect, of it. The law of Scotland says, that to render a deed effectual, the witnesses must see the



party subscribe, or hear him acknowledge his subscription. You are to say whether they saw the subscriptions, or heard them acknowledged.

No doubt the instrumentary witnesses are in such a situation as to make it necessary to look narrowly to their evidence. In Lord Fife's case, Lord Eldon says their evidence ought to be sifted and attended to with care and suspicion. Lord Mansfield said he would receive such a witness, but tell the jury not to believe him ; and Lord Kenyon adopted the same view. It appears to me that Lord Eldon's is the soundest view. We admit the witness because the objection goes to his credit, but it is for the jury to weigh it in scrupulous scales. They have done a solemn act without the solemn injunction being attended to which law requires, and they come to disaffirm that act. They come and swear that they neither saw the subscription, nor heard it acknowledged, though this may expose them to an indictment for forgery under the statute. As to Duff, he says he never acknowledged, and the witnesses say the same.

You are to draw the conclusion on the whole, whether they saw the subscription, or heard it acknowledged.

M'DOUGALL  
v.  
WIGHTON.

In a question of forgery, the instrumentary witnesses are admissible, but their evidence must be scrupulously weighed.

Verdict—" Find, 1st, That the signature

M'DOUGALL  
v.  
WIGHTON.

“ of James Stevenson adhibited to the bond  
“ is genuine. 2d, That the names of James  
“ Stevenson and John Duff were not signed  
“ in the presence of Peter Cochrane and Peter  
“ Hall, the instrumentary witnesses to the  
“ bond, and that James Stevenson and John  
“ Duff did not acknowledge their signatures to  
“ the said Peter Cochrane and Peter Hall.”

Nov. 13, 1830.

When the special case came before the Second Division of the Court of Session, the Lord Justice-Clerk said, That it had removed the doubts he had on the subject, and that he had no idea that a cautioner who admitted that his own signature was genuine, had a right to take advantage of such an irregularity with respect to the subscriptions of the other cautioners. That there was nothing in the special case showing that the creditors had bound themselves as to the regularity of the signatures of the other cautioners, or that the pursuer stipulated that, if they were free, he should not be liable. The Lord Chief Commissioner and the other Judges concurred in this opinion, and the pursuer was found liable in expences from the date of the Lord Ordinary's interlocutor.

*Hope, Sol.-Gen. and Forsyth, for the Pursuer.*  
*Cockburn and Rutherford, for the Defender.*  
(Agents, Daniel Fisher and Robert Cargill, w. s.)

JAMIESON  
v.  
MAIN, &c.

PRESENT,  
THE LORD CHIEF COMMISSIONER.

JAMIESON v. MAIN, &c.

1830.  
Jan. 7.

AN action of damages for assault and wrong-  
ous apprehension, imprisonment, and detention.

Finding for the  
defender in an  
action against a  
magistrate, &c.  
for assault and  
imprisonment.

DEFENCE.—The pursuer was guilty of a  
breach of the peace, and was in a state of furious  
intoxication, and the defenders did their duty  
in apprehending and imprisoning him.

#### ISSUES.

The issues were, Whether the defender as-  
saulted and struck, or wrongfully apprehended,  
imprisoned, or detained the pursuer? Or whe-  
ther Main “acted in the lawful execution of his  
“duty as a Magistrate?” and whether the  
others acted by his directions, or under his au-  
thority?

*Pyper* opened for the pursuer.—The assault  
and imprisonment are not denied; but it is said  
to be in the lawful execution of a duty. This

JAMIESON  
v.  
MAIN, &c.  


must be proved by the defenders. If there was no warrant, or if it was not intimated or shown when demanded, the imprisonment was illegal; and by ordering the pursuer to be bound, the Magistrate was party to the assault.

When part of the defences are given in evidence by the pursuer, if the defender insists on the whole being read, it will be held as given in by him.

When the defences were given in for the pursuer, the defenders wished the whole read.


LORD CHIEF COMMISSIONER.—The defences are one, and may be read. The defenders are clearly entitled to have at present all that may explain what the pursuer has read; but if the defences contain other matter, it must be held as given in by the defenders. I doubt whether all that is stated in the defences is necessary in explanation; but the jury will understand that what is read at present is merely to show why the warrant is not produced by the pursuer.

Where there are several defenders, the jury may find for one of them, that he may give evidence for the others.

At the close of the evidence for the pursuer, it was suggested that there was no evidence against two of the defenders, and that they ought to be admitted to give evidence for the other; and that, being father and son, both must be acquitted to render the evidence of either admissible.

LORD CHIEF COMMISSIONER.—It is for the jury to say whether they think there is any evi-

dence against them. As to John Brown, it does not appear to me that there is any evidence against him ; but as to his son, Robert, the jury will have to consider, whether his being present and speaking of a warrant does or does not implicate him as art and part. It is said, that, if the son remains a party, the father could not be called as a witness. There is no doubt a rule in the law of Scotland which excludes a father from giving evidence in his son's case ; but I do not at present say whether he might not be admitted for the other defenders. The pursuer casts his net wide, to catch all who were present ; but the Court and jury must be anxious to free all against whom there is no evidence. The jury will, therefore, say whether, having remained in the room, and spoken of a warrant, though there is no evidence of his striking, he can be free. If the assault had been the only question, he might have been acquitted ; but if he was aiding in the apprehension, it is premature to find for him at present, and his case must be considered with that of the other defenders.

JAMIESON  
v.  
MAIN, &c.  


*Cockburn*, for the defenders.—The question is, whether this was a wrongful apprehension ? When a magistrate is credibly informed that a

JAMIESON

v.

MAIN, &amp;c.

1 Hume 134,  
edit. 1800.

2 Hume 76.

In an action for assault, the defender found entitled to prove the pursuer violent in his family.

man is riotous, he not only may, but ought to send a warrant by an officer, who may use such force as is necessary to enforce it, and is not bound to show his warrant if he is a known officer, or if the party is drunk and unable to read it. A verbal warrant in some cases is sufficient.

A witness for the defender was asked as to the conduct of the pursuer, to which he objected that this was surprise, and that evidence of character was incompetent.

LORD CHIEF COMMISSIONER.—The issue we have to try is, whether the magistrate acted as he ought. His justification is, that he had good ground for issuing the warrant, and how the party conducted himself in his family, is clearly evidence in the cause.

In an action for assault, evidence rejected that a near relation of the defender came from his house bleeding, and in a state of alarm.

An objection was also taken to the question, whether the pursuer's mother came in a state of alarm into another house with her arm bleeding, &c. ?

LORD CHIEF COMMISSIONER.—This is more doubtful. That *res gestæ* may be proved cannot be doubted, but the doubt here arises from this not being clearly traced to the pursuer, as the cause of the injury ; it may have been acci-

dental. You may prove the state of the man's mind, but, on the whole, though at first I thought I must receive it, I am now of opinion you cannot prove this, as it is not brought home to the pursuer.

JAMIESON

v.

MAIN, &amp;c.



An objection was then taken to the question, whether the pursuer was a violent man?

In damages for assault, competent to ask if the pursuer is a violent man.

LORD CHIEF COMMISSIONER.—This has been admitted from the first institution of this Court. Not that you can prove particular facts but general character. I am clearly of opinion that this may be given in evidence, more particularly in a case against a magistrate and officer. It is essential to justice to show his character.

Two sons of the defender, Brown, were offered as witnesses, but withdrawn when objected to.

*J. A. Murray* in reply.—Every effort has been made to keep out of view the merits of this case. The question here is not whether there was a riot, but the legality of this warrant and imprisonment. It was a mere domestic dispute, in which the magistrate had no right to interfere. There was no riot till the officer came, who, instead of showing his warrant as

JAMIESON  
v.  
MAIN, &c.

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he was bound to do, struck the pursuer. The warrant was only for examination, and the pretence for imprisoning him was, that he deformed the officer. The officer was the wrong doer, and there could be no deforcement, as he did not show his warrant.


LORD CHIEF COMMISSIONER.—This is a civil action by the pursuer to recover damages for an injury he has received, and much has been said of the legality of this warrant on both sides. You are not judges of the law, but the fact, and if the Court direct you wrong on the law, the party has his redress. In what I am about to state you will not suppose that I have any leaning, on the one hand, against the liberty of the subject, or the right of an injured individual to reparation, or, on the other, against the magistrate, who is bound to act in the discharge of a duty, and is not to be laid under trammels which will prevent his acting. It is clear on the general law of an officer acting, that he is bound to have a warrant, and to make the party understand that he has it, but he is not bound to give it up. In some cases he may act without it, and in a recent case I laid it down as law, that the circumstances were sufficient to justify taking without a warrant, as the




party might have escaped if not immediately taken ; and in this case there may be facts and circumstances justifying the taking, though the warrant was neither read nor exposed.

I shall lay before you the history of the case before considering the particular issue, and I feel extremely anxious for the credit of the Court,—the safety of magistrates,—the safety of the community,—and the respectability of juries, that you should have before you what has occurred to me on this case.

After stating the situation in which the pursuer was at the time,—his drinking,—disposition to riot,—the alarm of those in the neighbourhood,—that a warrant was granted for his examination,—and his conduct when the officer went to execute that warrant, his Lordship said : One witness has stated that the officer first struck the pursuer on the fingers, and if he did so, that was an assault ; but this is extremely improbable, and the witness is not confirmed. The only other assault stated is the fact of apprehension and imprisonment. If you are satisfied that the facts are as I have stated them, then you are in perfect safety to find for the defender, though the warrant was not produced, as the party was not in a condition to profit by its production, and I

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cannot allow you to find damages merely because a warrant was asked for and not produced. This is a case in which a party *having* a warrant was not bound to show it.

There is no doubt here on the fact of the pursuer being taken away and imprisoned, and little doubt as to the manner in which this was accomplished. The important question is, whether it was wrongfully done? and in judging of this, if the Magistrate did no more than he was entitled to do on the application made to him, and if the officer did no more than was necessary to fulfil the orders of the Magistrate, then there was no wrong, and you will find for the defenders—if more was done, then you will find damages for that excess. But in doing so you will take into account that this was a powerful athletic man—that he was too much for the officer—that this was represented to the Magistrate, who sent others to assist to bring him for examination. All this is brought about by the instigation of the pursuer's wife, and can it be seriously said that there cannot be a breach of the peace by a man against his wife? If such a case is brought before a Magistrate, was it not fit to bring the person for examination? And as he was riotous, and injured some of those sent to apprehend him, was it not necessary to

tie him in the manner he was tied ; and before this was done, was this a time for reading to him a warrant, which might have afforded him time to escape ?

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The Magistrate finding him not in a state fit for examination, ordered him to prison, which, in the circumstances, was necessary without a warrant, and you will judge whether more was done by him or the jailor than was necessary.

A complaint has been made of the state of the jail, and of his treatment while there. A bailie of a burgh, or justice of peace, is not responsible for the state of the jail, and if they give a party the best room they have—if his friends have access to him—and if he meets with the usual treatment in the jail, you will say whether more was done than was necessary to detain him till he was sober.

The defence on the first issue I do not think made out. On the second, I think it was more correct for the officer to state that he was in possession of a warrant, but not to read it. On the third, the Magistrate had authority to grant the warrant, and it was regular, and there is pregnant evidence to show that the pursuer was guilty of deforcement, in resisting what his own acts made necessary. The issue in defence is very important.

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v.  
MAIN, &c.

When an action is brought against a Magistrate, as such, malice must be stated ; but in the present case, the action is not brought in that way, but the action is met by the defence of acting as a Magistrate, and the others as under his authority. There are three things charged against the Magistrate. 1st, Granting the warrant ; but that was regularly done on the application of the wife. 2d, Sending assistance. 3d, Sending the pursuer to prison ; but you must consider whether these were not necessary acts in the circumstances. It is for you to say whether he was not in the execution of his duty, and the result is important to the country, to justice, to Magistrates, and to subjects.

An intention to present a bill of exceptions being intimated,

LORD CHIEF COMMISSIONER.—My direction is, that the jury are to consider whether the pursuer was not in such a state as to make the reading the warrant unnecessary. A person who is not in a condition to understand a warrant would be guilty of deforcement, if he resisted its execution, though it had not been read to him.

Verdict—" For the defenders."

In this case application was made to the Court to compel the agent to pay certain witnesses who had been brought to attend the trial.

JAMIESON  
v.  
MAIN, &c.  
Feb. 12, 1830.

LORD MACKENZIE.—There is not much doubt on this subject. The act of Parliament states, that we are to proceed in the same manner as in the Court of Session, and under this clause a party gets a diligence against witnesses, by which they are compelled to attend. This is hard on the witnesses who have nothing to do with the cause, but it is necessary ; and can it be doubted when we are empowered to grant this against witnesses that we are not also empowered to do what justice requires ? It has been said at the Bar that this is part of the *nobile officium* of the Court of Session. This power must have existed long before the Court of Session, and I have *no* doubt that we have it. The question then is, What is the practice in the Court of Session ? There, the witness is not entitled to demand payment before giving his evidence ; and I have often, when acting as commissioner, told them they had no such right ; but it was uniformly admitted by the agent that he was liable. There is clear evidence of this in the act of sederunt, which merely enacted a new regulation as to an an-

A. S. Dec. 21,  
1765.

JAMIESON  
v.  
MAIN, &c.

Feuars of Fraserburgh v. Lord Saltoun, 19th June 1707.  
Mor. 16712.

cient rule of law. The Court gave the power to the Lord Ordinary as more convenient, but there can be no doubt that it had previously been exercised by the Court. Long before the act of sederunt this was done, and the act is a mere regulation of the former practice of the Court.

This may be hard on agents, but it is necessary, and it is not harder than compelling witnesses to attend. If I were to go on the reason of the rule, I would say I consider it reasonable, as you must either pay the witness before, or give him a claim against a person on the spot. I do not know how it was first introduced. It may have been by act of Parliament. As to the *nobile officium* of the Court of Session, I do not know what it means; but if what is meant is the equitable power of the Court, then nine-tenths of our law is founded on that. As to whether there is a power to appeal such an order, I can only say at present, that we must exercise our power.

LORD CHIEF COMMISSIONER.—In cases like the present I am always anxious to hear the opinion of Judges of the Court of Session. I am fearful of stating my own view first in a case of this sort, least I should mix with it the law of

another country ; but in Mason's case \* I had the opinion of Lord Pitmilley, and now I have the opinion of Lord Mackenzie, proving the law by a decision 120 years old, and by the act of sederunt. This being established, and there being no authority to contradict it, or more modern decision to weaken its force, the only question is the power of this Court. We are to act in every thing according to the law of Scotland in regulating the rights of parties ; what relates to the constitution of the Court is of a different nature. The question is, whe-

JAMIESON  
v.  
MAIN, &c.

\* This was an application made to the Court on the part of certain witnesses to have the expence of their journey paid before they left home, as they had no prospect of recovering it afterwards.

Jan. 8, 1830.

LORD PITMILLY.—The act of sederunt 1765 did not make the law but declare it, and there are many decisions showing this. By the act of sederunt witnesses must come on a diligence, but if second diligence is required, they get no expenses. If after they come they are not paid, the Court have strong powers. They will imprison the agent. There is one case so pointed as to this extraordinary power of the Court that I shall read it. The witness came once but refused to come a second time, and the Court granted the expense of the first, but not of the second attendance. This case decides—that the witness must come—that his coming warrants his payment—that if a second diligence is required he gets no expenses. This is the remedy, then, these witnesses have, they must come, and the Court will grant warrant as I have stated.

A. S. Dec. 21,  
1765.

Feuars of Fraserburgh v. Lord Saltoun, 19th June 1707.  
Mor. 16712.  
Gordon v. M<sup>r</sup> Farlane, Dec. 3, 1794. Mor. 16785.

LORD CHIEF COMMISSIONER.—I entirely agree.

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GRANT  
v.  
BARCLAY, &c.

ther we are to make the agent pay the witnesses, and I think it clear from the clause in the statute that we ought, as, unless you construe it in this manner, we have no power as to expenses of witnesses, and a power is given of inflicting punishment to compel witnesses to attend. The legislature enacted wisely and generally, and the Court is to find out the law of Scotland. The principle of law being established, and being confirmed by two Judges, I cannot doubt on the subject.

*J. A. Murray and Pyper*, for the Pursuer.

*Cockburn and J. H. Robertson*, for the Defender.

(Agents, *Thomas Megget*, w. s. and *M'Kenzie and Innes*, w. s.)

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PRESENT,

LORDS CHIEF COMMISSIONER AND PITMILLY.

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1830.

Jan. 8.

GRANT v. BARCLAY ALLARDICE, &c.

Damages for  
killing two dogs.


AN action of damages against a master and servant for killing two dogs.

DEFENCE.—The dogs had been frequently alone in the grounds of the master, and near a valuable stock of sheep, and he was justified in ordering his servant to shoot them. He offered full and reasonable compensation for the dogs.



## ISSUE.

“ Whether, on or about the 9th day of November 1827, on or near the muir of Ferrochie, in the parish of Fetteresso, and county of Kincardine, the defenders, or either of them, did wrongfully shoot, or cause to be shot, a dog or dogs, the property of the pursuer, to the loss, injury, and damage of the pursuer?”

GRANT  
v.  
BARCLAY, &c.  


*Jeffrey, D. F.*, opened the case, and said, This is a novel action, not from any doubt of the law, but from the nature of the defence.

The defender invited this action, and comes to try to get you to sanction an unlawful order which he published, that all dogs straying without masters would be shot. He paid a premium to his keeper for killing vermin and *dogs*. It is said that notice was given. We deny the notice ; but notice of an unlawful purpose does not make it lawful. Dogs are valuable property, and must be protected.

In England, it is decided that a dog going into a neighbouring field, is not a ground for an action of trespass, unless he had done damage. Even when doing mischief, the killer is liable in damages.

*Skene* opened for the defenders.—We do

Com. Dyg. 401.  
11 East, 568.  
2 Marshall, 584.  
7 Taunt, 503  
and 504. Wright  
v. Ranscott.  
1 Saunders, 84.

GRANT  
v.  
BARCLAY, &c.



Todridge v. An-  
drow, Jan. 1678,  
3 Br. Sup. 223.

Colquhoun v.  
Buchanan. 6th  
August 1785.  
Mor. 4997.

not maintain that a person may kill a dog because it is on his property. There was no special order to kill these dogs, and the general order was reasonable, in defence of a valuable stock of sheep. In Clayton's case, the Judges differed as to the facts; but here there is no doubt of the trespass. It is said, that, if a dog is killed in self-defence, the killer is liable in the value. In the case in Saunders, the fact did not justify the killing.

In this country it was found that farmers might follow a fox, on enclosed ground, for the purpose of destroying him, without being guilty of a trespass, though this is not the case when following one for amusement.

In this case the pursuer lost his dogs by his own negligence.

In an action for killing dogs, incompetent to prove the practice of killing them in a different district of the country.

A sheep-farmer, from a different part of the country, was called for the defender, and asked whether it was the practice of the country where he lived to kill dogs going at large.

*Jeffrey, D. F.*—This is proving law, or what, in the opinion of the witness, ought to be law.

*Skene.*—I wish it as an important fact, that on sheep-farms, it is found necessary to act as the defender did, and also as an answer to it being done vindictively.

LORD CHIEF COMMISSIONER.—There is one, and only one, way in which the evidence of this person can be relevant, if he were called to prove the nature of the flock, and the effect of dogs going near them. But what is asked goes to prove the practice of the part of the country where he resides as general law.

GRANT  
v.  
BARCLAY, &C.  


*Jeffrey*, in reply.—I deny that a likelihood of injury justifies killing. Even when a dog chases or bites sheep, it is only necessity will justify killing, as the proper remedy is by action against his master. The law is with me, but there is here no fact to raise a question. The value of the dogs is not what they would have sold for, as no one is entitled to force me to sell.

LORD CHIEF COMMISSIONER.—This is not a case in which I am to lay down to you any abstract doctrine of law, as it must be decided on considering coolly the facts and circumstances of the case. I am at a loss to know how such a general order as was here given can be vindicated ; at the same time I do not say that a case might not be made out, on proof of the disposition of the dog, and the circumstances in which he was found, justifying his being shot.

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v.  
BARCLAY, &c.



It is admitted that the dogs were shot by the one defender by directions from the other, so that the only questions remaining on the issue are, whether this was a wrongful act, and to the injury and damage of the pursuer. If it was, then there must be a verdict against both defenders. If a dog is known to be a sheep-killer, and is found on the property of a gentleman having sheep, I do not say it is necessary to wait till he is near his prey, annoying or worrying the sheep, before he is killed. But the case is very different when this is not the character of the dog. It is always a question of degree what entitles the person to prevent the apprehended injury.

The order in this case was general, without reference to the character of the dog, and in reason it is not fit that such an order should be given.

There was no evidence in the present case to show that the dogs were sheep-stealers, or that they were approaching to, or in the habit of approaching, the sheep, or that they were causing or risking any injury. The facts and circumstance are sufficient for the decision of this case without laying down any general law upon it. If the dogs wandered too frequently, expostulation with their master was the proper remedy.

**Verdict—"For the pursuer, damages L.50."**

PROMOTER LIFE  
INSURANCE CO.

*Jeffrey and A. McNeill, for the Pursuer.*

*Skene and J. H. Robertson, for the Defender.*

(Agents, *John Turner, w. s. and Walter Duthie, w. s.*)

*v.*  
BARRIE'S RE-  
PRESENTATIVES.

PRESENT.

LORDS CHIEF COMMISSIONER AND CRINGLETIE.

1830.  
Jan. 9.

PROMOTER LIFE INSURANCE CO. *v.* BARRIE'S  
REPRESENTATIVES.

REDUCTION of a policy of insurance, on the  
ground of misrepresentation as to the health  
and habits of the person whose life was insured.

Finding for the  
defender in a  
reduction of a  
policy of insu-  
rance, on the  
ground of mis-  
representation.

DEFENCE.—The representations were true.

ISSUE.

"Whether the Policy of Insurance No. 9  
"of Process, bearing to be an Insurance by  
"the pursuers, of the sum of L. 1000 on the  
"life of the late Andrew Barrie, surgeon in  
"the Royal Navy, for a year, from the 29th  
"day of August 1827, is not the Policy of the  
"pursuers?"

PROMOTER LIFE  
INSURANCE CO.  
v.  
BARRIE'S RE-  
PRESENTATIVES.

*Cockburn* opened for the pursuers and said, Insurance is a contract depending on mutual good faith, and here there was not only concealment, but misrepresentation. A policy may be void where there is no fraud, as a person may have swallowed poison without knowing it, but intentional misrepresentation is much stronger. The question here is, whether *Barrie* was addicted to the habit of drunkenness, and to such an extent as to render the policy void? He was represented as having no disease or infirmity tending to shorten life, and the person who made this representation had warned him of the danger of his habits.

A letter written by a person not intrusted in a suit, admitted in evidence after the writer became interested in it.


*Murray* and *Cockburn* proposed to produce a letter from the friend who granted the certificate of *Barrie's* health, and said, He is a defender; but, if he were only a witness, we would be entitled to ask him whether he said he had tricked the office.

*Jeffrey, D. F.*—This is not an action of damages against this person. I deny that they can prove any thing as to him.

LORD CHIEF COMMISSIONER.—The difficulty in my mind is, that they are entitled to falsify the statements in the certificate, but they

must do it by legal evidence. Suppose the parties were all in the same situation as when the certificate was granted, then the surgeon had no interest or character to prevent him from being a witness, and, in that case, you might show him his letter, but must trust to his oath. He has, however, now altered his condition, by being a defender; and the question now is, whether, in this character, his letter may be used against him.

PROMOTER LIFE  
INSURANCE CO.  
v.  
BARRIE'S RE-  
PRESENTATIVES.



*Jeffrey.*—He was not a party at the time, and it is only when a person, being a party, makes an admission, that it can be used against him.

LORD CHIEF COMMISSIONER.—The principle of the law of Scotland by which you may prove what was said by a witness who is dead, bears on this point, and, as you cannot call him as a witness, I think the letter may be received.

An affidavit made by a brother of Barrie was tendered but rejected. A medical gentleman was called, and asked whether dram-drinking is injurious to the liver.

*Jeffrey, D. F.*—This is surprise.

LORD CHIEF COMMISSIONER.—They may

PROMOTER LIFE  
INSURANCE CO.

v.

BARRIE'S RE-  
PRESENTATIVES.

In a reduction of a policy on the ground that a habit of dram-drinking was concealed, incompetent to ask whether the party was reputed a dram-drinker.

prove the habits of this person, and the effect it had on his liver.

A witness being asked whether Barrie was reputed a dram-drinker, his Lordship observed, that this was a case where the nail must be hit on the head, and that the way to do it, was by getting into the dram-shops and proving what he drank.

Objections were also sustained to the questions. In what terms would you have granted a certificate? Was you surprised at the certificate granted? Was you surprised that he got an insurance? Was his an insurable life? On the question, was the falling off in his health the effect of drinking? His Lordship said, The only way you could get at this evidence, would be to prove in presence of a medical gentleman, the number of drams he took, and then ask what effect they would have.

Incompetent to prove a certificate false, by proof of contrary statements by the person who granted it.

When a question was put to prove that Aiton, who along with the brother-in-law granted the certificate, had made statements contradictory to his certificate.

*Jeffrey, D. F.*—It is not competent to prove this fraud against a person who may be called as a witness. They must prove the facts



stated not to be true, but they cannot do so by proving his belief.

*J. A. Murray.*—I may prove the statements false ; but as the party warrants that the certificate was granted *bona fide*, I may also prove that they laid their heads together to grant a coloured certificate, or that they rest on one known to be false.


PROMOTER LIFE  
INSURANCE CO.

v.  
BARRIE'S RE-  
PRESENTATIVES.

LORD CHIEF COMMISSIONER.—My difficulty here is not on principle. There is no question here as to the fraud of Aiton, and the only point is, whether you can prove this certificate true or false, through this medium. It is trying the truth of a certificate by statements ?

In England there is no doubt it would be competent, but I wish to know whether a person who is called as a witness can have proof brought against him of statements made to another. If the law of Scotland would allow it, the truth of the fact in the certificate may be inquired into, by proof of declarations elsewhere, or the witness may be cross-examined from a deposition. But at a very early period of this institution, I learned that this is incompetent here, and the present case appeared to me analogous, and my doubts have been confirmed by Lord Cringletie.

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INSURANCE CO.  
v.  
BARRIE'S RE-  
PRESENTATIVES.



There is no doubt that a false certificate, or a certificate known to be false, will set aside the contract, but this must be proved by evidence competent by the law of Scotland. If you prove that the person granting the certificate went to the dram-shop with Barrie, you may in this way prove the certificate false, and that he knew it false, but you cannot prove it by his declarations.

At the close of the pursuer's case the jury may find for the defender without hearing his counsel.

At the close of the evidence for the pursuer, the Dean said, he thought, before addressing the jury, he was entitled to ask whether they had any doubt on the case? Mr Cockburn answered, that he thought the jury were entitled to say so without being asked.

LORD CHIEF COMMISSIONER.—I am not quite sure whether the jury are fully aware of the points to which their attention ought to be directed. With great respect for Mr Cockburn, I must say I think he overstated his case.

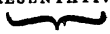
This is a question as to a policy of insurance, and before it is entered into, certain questions are put and answered, and, according to the answer to these, the policy is granted or refused. The first point for consideration is, whether these questions are answered in such a

way as to amount to misrepresentation or not, and whether the concealment was such, that if the facts proved had been disclosed, the life would not then have been insured? I shall not state my opinion on the evidence now, but I feel more anxious on this subject, as a delicate question arose on a rule of evidence peculiar to Scotland.

(The jury here intimated that their minds were made up.)

I wish you to be aware that, in a life assurance, if there is an existing disease at the time the policy is granted, it is like the case of a ship not being sea-worthy in marine insurance; but here the case is rested on representations made by persons competent to make them, who state, that Barrie took a glass of grog, but was not otherwise intemperate, and he denied to Dr Ballingall that he was intemperate, which, as well as the certificates, is a fact for your consideration. It was said he had the habit of drinking whisky, which must mean undiluted, but the pursuers do not bring the highest evidence, as there is only one witness who speaks to his drinking one or two glasses of whisky on one occasion; and though it was proved that he went into other shops where spirits are sold, no one was brought from these shops to prove

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BARRIE'S RE-  
PRESENTATIVES.



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v.  
BARRIE'S RE-  
PRESENTATIVES.



his having got spirits. This is important evidence in favour of the conclusion to which you have come ; but there is other evidence to balance, and though you judge of the fact, it is important that you should be in possession of the views of the Court, as so much law has been stated.

The other witnesses do not speak of spirits, but mention generally the smell of spirits, and that he took grog at noon. You will consider whether this is the glass of grog mentioned in the certificate, or whether it is a larger quantity ; and whether it does not fairly come under the term temperate, as there was no proof of drinking beyond the term in the certificate. Something was proved of his being warned that he would kill himself if he did not change his habits, but there was no evidence of the date of this, and, though the use of spirits is injurious to health, I cannot say it is proved to the extent to take away the truth of the certificate, or that there was such misrepresentation or concealment as will void a policy made on the faith of the certificate.

Verdict—" For the defenders."

*J. A. Murray and Cockburn, for the Pursuers.*

*Jeffrey, D. F. and E. Monteath, for the Defenders.*

(Agents, *John Whitehead, s. s. C. Fr. Hamilton, w. s.*)

KERRS &amp; Co.

v.

PENMAN, &amp;c.

PRESENT,

LORDS CHIEF COMMISSIONER AND CRINGLETIE.

1830.

Jan. 11.

KERRS AND COMPANY v. PENMAN, &amp;c.

AN action against the widow of the acceptor of two bills of exchange, and two others, on the ground of vitious intromission.

Finding for the  
defenders on a  
question of viti-  
ous intromission.

DEFENCE for the widow.—That she was confirmed executrix, and made up inventories, and that the property was of small value, and was preserved ;—for another defender, that he accounted for his intromissions, which were authorized by the relict ;—for the third defender, that he did not intromit.

## ISSUE.

“ It being admitted, that the late Robert  
“ Penman died on the 1st of February 1828,  
“ and, at the time of his death, the said Robert  
“ Penman was indebted to the pursuers in the  
“ sum of L. 90, 16s. 7d., contained in a bill,  
“ dated 1st October 1827 ; and the sum of

KEERS & Co.  
v.  
PENMAN, &C.

“ L. 61, 10s. 9d. contained in another bill,  
“ dated 28th November 1827; and that the  
“ sums contained in said bills have not since  
“ been paid :

“ Whether, subsequent to the death of the  
“ said Robert Penman, the defenders, or any  
“ of them, vitiously intromitted with the funds  
“ and effects of the said Robert Penman ?”

2 Bank, 421,  
§ 3, Ersk. 3. 9,  
§ 56. Drum-  
mond v. Camp-  
bell, 13th Dec.  
1709. Mor.  
14414, Ritchie  
v. Bowes, 7th  
Mar. 1795.  
Mor. 9838.

*Rutherford* opened for the pursuers and said, The action is for illegally taking possession of the property of a person deceased. Being the widow and confirmed, is no defence if the inventories were defective. If they are intentionally so, this *increases* the presumption of fraud, and presumed fraud is the foundation of this part of the law.

A great change was made on this branch of law at the end of last century, but still, where the inventories are fraudulent, or when possession is taken beyond them, the law is the same.

A letter sent by  
a pursuer as  
notice to the de-  
fenders, admit-  
ted in evidence  
for him.

When a letter from the pursuer to one of the defenders was produced,

*Jeffrey, D. F.* objects.—This can only be evidence to explain the answer, and they must produce the answer. Their statement cannot be evidence for them.

*Cockburn*.—We use it as proof that, on the 8th of April, they had notice that we intended to challenge their proceedings.

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v.

PENMAN, &c.

LORD CHIEF COMMISSIONER.—You use this as a notice to the other party, to show that they were warned, and that their conduct was founded on it. A written notice of a party is evidence for him. The question is, Whether sending a letter of the nature of a notice is sufficient? If the notice had been verbal, they would have got the answer on cross-examination.

The brother of the deceased was called, and stated, that he had a claim against this estate for funeral expenses. This being a preferable debt, was not held an interest to disqualify him.

A person having a preferable claim against an estate not disqualified from giving evidence.

It was then proposed, but objected to, that the minute made by the relations at sealing up or opening the repositories should be read.

LORD CHIEF COMMISSIONER.—The paper cannot be produced in evidence, but the witness may look at it, and you may examine him on the facts.

A minute made up after a funeral by the relations of a deceased person not admitted in evidence.

A witness having stated that she was precognosced about eighteen months ago, and a second

A person received as a witness, though precognosced in presence of her husband.

KERRS & Co.  
v.  
PENMAN, &c.

2 Hume, 379.—  
Fall v. Sawers,  
10th August  
1785, Mor.  
16777.

time lately, and that on the second occasion her husband was present, and that she was present while he was precognosced.

*Jeffrey and Thomson* object.—This is a case in which the agent gave them an opportunity of making one story if they chose. The objection is not founded solely on the disapprobation of the practice, but it is held that the memory of the witness is thus tainted and confused.

*Cockburn*.—I leave this to the Court. In the cases referred to, it was combined with impropriety, here the being present was casual, and with no bad intention.

LORD CRINGLETIE.—I am satisfied that Mr Cockburn's is the true interpretation of the law. In all cases it must amount to prompting or instructing the witness, and if the conduct of the party amounts to tampering with, or instructing the witness, the objection is good. In all the cases where the objection has been sustained, the Court have been satisfied of this, but it has not been sustained when the presence of the witness was natural or accidental. There was a case before me where there had been a criminal proceeding, and the procurator-fiscal was received, though he had been present at the examination of the others.



LORD CHIEF COMMISSIONER.—I was particularly anxious to hear the opinion of my brother, from a wish not to trench on any peculiar regulation of the law of Scotland. There is nothing to which I would more strictly adhere, than in what regards partial counsel to a witness, but in this case the witnesses were first examined separately, and nothing appears of any suggestion made to amend their testimony, or alter what they had said before.

KEERS & Co.  
v.  
PENMAN, &c.  


We have not decided this point *in specie*, but in one case, when I wished to call back a witness after he was examined and dismissed, Lord Pitmilley thought it incompetent, and I yielded; and in another case a witness was called back.

A witness coming into Court and hearing another examined must be excluded, as it cannot be ascertained what impression was made, or what his motive was.

If the case does not amount to one of partial counsel, it will not exclude him. The rule does not appear to me so stern that in no case a witness who has heard another examined can be received.

His Lordship was requested to note this as a most important point in the law of evidence.

COUSELAND  
v.  
CUTHIL.

**LORD CHIEF COMMISSIONER,**—In ancient times the rules as to vitious intromission were strictly applied, but more recently they have been gradually relaxed. In the present instance no case of vitious intromission has been made out, as it is cured by the confirmation, and two inventories, in which there is no appearance of fraud; on the contrary, the taking the goods appears most proper. They were taken by the widow to her father's openly, and it was fair she should have the use of them. Two inventories are made up. There is no foundation in the proof for the statement that there was money taken away, and it would be beyond all example, if you were to render the defenders liable for the whole debts.

**Verdict—For the defenders.**

*Cockburn, Rutheford, and Shaw, for the Pursuers.  
Jeffrey, D. F., and R. Thomson, for the Defenders.  
(Agents, A. C. Howden, w. s. and Wm. Hunt, w. s.)*

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PRESENT,

THE LORD CHIEF COMMISSIONER.

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1830.  
Jan. 11.

COUSELAND v. CUTHIL.

Damages for de-  
famation.

**DAMAGES** for written and verbal defamation.

**DEFENCE.**—The defender did not mean to injure the pursuers, and, in the circumstances, the action ought not to have been brought.

COUSELAND

v.  
CUTHIL.

## ISSUES.

The first related to a letter in which it was stated, that the pursuers were not worth L. 5, and the second to the defender saying they were bankrupt.

*Robertson* opened for the pursuers.—The pursuers are shopkeepers beginning business, and their credit is most important to them. The defender is a rival trader, and this letter, to which the case is now limited, is beyond all the bounds of fair mercantile correspondence.

A witness was asked on cross-examination by the defender, whether he granted a bill?

Incompetent to prove the contents of a bill by parol.

**LORD CHIEF COMMISSIONER.**—You cannot have the contents of the bill from the witness, but must produce the bill.

*Cuninghame* opened for the defender.—This is a frivolous case. There is no evidence of malice or falsehood, and the defender was entitled to write the letter.

**LORD CHIEF COMMISSIONER.**—I do not in

COUSELAND

v.

CUTHIL.



this or any case wish to aggravate damages, but I should do wrong if I did not tell you that there is a case for your consideration. The defence is a legal one, if you think it made out in evidence, as every one is entitled to make a confidential communication as to the circumstances of another, to a friend who calls for it with a view to dealing with that person, in the same way as a master, when called on, is entitled to tell the truth of his servant, though that may reflect on the character of the servant. The *inuendo* as to the meaning is admitted, and the question is on the falsehood and calumny. If falsehood is proved, the malice which law requires is presumed, and law by implication holds calumny false, which is not proved true. If the defender meant to plead the truth, he ought to have undertaken to prove it, and to have proved it. You are here to consider whether this letter contains fair and candid information to a correspondent, or whether it contains more than was required, and what establishes bad intention on the part of the defender. It seems to me to go beyond information, as it holds out a threat of not dealing with their correspondents if they employ the pursuers. This is not a case for high damages, but for such moderate sum as will not too much

hurt the one, and will free the other from un-  
easiness.

HILL  
v.  
KING.

Verdict—"For the pursuer, damages L.20."

*P. Robertson*, for the Pursuers.

*Cuninghame*, for the Defender.

(Agents, *John Campbell Jun. w. s. Alexander Burns*, w. s.)

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PRESENT,

THE LORD CHIEF COMMISSIONER.

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HILL v. KING.

1830.  
Feb. 1.

THIS was a reduction of a finding by the Judge-  
Admiral assoilzieing the defender from a claim  
for repetition of the price of a vessel.

Finding for the  
pursuer on a  
question of fraud  
in the sale of a  
vessel.

ISSUE.

" Whether, on or about the 11th day of July  
" 1810, at Guadaloupe, in the West Indies, by  
" fraud, deceit, or misrepresentation practised  
" by the defender on the pursuer, the pursuer  
" was induced to purchase the vessel called the  
" Smile of Spring, and to pay for the said ves-  
" sel the sum of L. 2200 Sterling, to the loss,  
" injury, and damage of the pursuer?"

HILL

v.

KING.



1 Bell's Com.  
297; Marshall,  
on In. 450.  
Brown on Sale,  
407, and 2 Dow,  
Rep. 266;  
Wood v. Baird,  
5th June 1696;  
Duthie v. Carne-  
gie, 21st Janu-  
ary 1815.  
In a question of  
fraud, a private  
letter inadmissi-  
ble in evidence,  
unless the party  
accused was pri-  
vy to it.

*Shaw* opened for the pursuer, and said, The action now is not for damages, but merely for repetition of the price of an American vessel, which, before it was sold, was captured for want of the protection of a British registry. The vessel had broken the non-intercourse regulations of 1809, and this was known to the seller, but not communicated to the purchaser. Sale being a mutual contract, the concealment of a material fact vitiates the sale.

When a letter from the agent of the seller was produced,

*Hope, Sol.-Gen.*—There is no evidence that this was shown to us, the purchasers.

*Jeffrey, D. F.* This is a case of fraud to be made out by facts and circumstances.

LORD CHIEF COMMISSIONER.—This case is bottomed on the vessel being sold as an English vessel. She came to the Clyde, and was first advertised as an American vessel, and then not. She is purchased by Paterson and Company, and sent out to the West Indies, and every public act, which they are bound to know, must affect them. But in a question of fraud, the actual knowledge must be brought home. If a party is not in the clear knowledge of the fact, it will not

affect him. Here he has no privacy to the transaction,—there is no evidence of his knowing it.

HILL  
v.  
KING.



*Hope, Sol.-Gen.* opened for the defender.—The pursuer has not brought the most material witness though he is here. The proof is not against any of the parties here, but the agent in the West Indies; and every thing has been brought into the case, except the only thing which is relevant under the issue, viz. the transaction between the pursuer and defender. Before finding for the pursuer, you must not only suspect, but you must have proof that the fraud was practised by the defender. The vessel is sold as the Smile of Spring, and the pursuer puts on board a false register, that of the Enterprize, and she is captured; and is the defender to be held liable?

LORD CHIEF COMMISSIONER.—It was not from any doubt in my own mind that I allowed the Solicitor-General to go fully into the case, but from thinking we ought to hear a case which has lasted for ten years fully stated. The question is, whether it is made out to your satisfaction that by fraud, deceit, and misrepresentation, the defender induced the pursuer to

HILL  
v.  
KING.



pay L.2200 for the vessel. This is to be done by proof, and with this view the history of the vessel was proved,—her coming to this country under one name,—being advertised once as an American,—and then this description dropped.

A case of this sort is not to be decided on suspicion, but it must be made out by clear evidence that there was fraud in the transaction, and, in this case, it must be fraud by the defender. This vessel came to Greenock as a Portuguese, but if, when she sailed, they suspected her to be American, that lays a foundation for a case of fraud.

It is a subject of serious consideration with juries when a material witness is not called, and, in this case, if James Paterson had been called, he could have cleared up whether there was fraud or not. An eminent judge in England once said, he would have called for such a witness till heard at the extremity of the Court, but I do not say that his not being called is alone a sufficient ground for a verdict. It is fair to say the defender might have called him, but then the question is, whether the pursuer has left his case in such a state of weakness as to make it unnecessary for the defender to meet it by evidence. And if fraud is alleged, it



must be made out on the strength of the evidence of the party who alleges it.

HATTON  
v.  
PEDIE.

Verdict—"For the defender."

*Jeffrey, D. F. and Shaw, for the Pursuer.*

*Hope Sol.-Gen., Forsyth, and Cockburn, for the Defender.*

*(Agents A. P. Henderson, and Daniel Fisher.)*

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PRESENT,

LORD MACKENZIE.

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HATTON v. PEDIE.

1830.  
Feb. 22.

THIS was an action of damages by a feuar in Edinburgh against his superior, for not making up a street,—for neglecting to adjust the boundary of the feu with a neighbouring property,—for delay in furnishing a plan of the houses to be erected.

Findings for the defender on questions as to the obligations by a superior in a town to make up a street, &c. to his vassal.

DEFENCE.—The pursuer was bound to make up the street opposite his own feu, and there is no practice laying it on the defender. The defender gave the pursuer the full extent of ground purchased *within* his own property. The defender furnished a plan which was not objected to till this action was brought.

HATTON  
v.  
PEDIE.

## ISSUES.

1. and 2. Whether the defender wrongfully failed to make up the street opposite the unfenced stances in the street, in breach of the original agreement and a subsequent promise?

3. and 4. Whether he promised, and wrongfully failed, to make up the road opposite the ground fenced by the pursuers? And whether the pursuer made it up, and the defender wrongfully removed it?

5. and 6. Whether the defender wrongfully failed to adjust the march,—and promised, but failed, to put the pursuer in possession on 2d May 1825?

7. Whether he failed to furnish the plans.

*Rutherford* opened for the pursuer, stated the facts, and contended—That a person fencing ground was bound to make up a street, and give access to it. By the conduct of the defender the pursuer has been kept eighteen months out of possession.

A report by an architect read to prove that he made such a report.

When a report by Mr Brown, the architect, was produced,

*Cockburn* objected.—This is not evidence.

*Rutherford*.—We are entitled to read this, to prove the report made, as it is admitted to

be genuine, though it may not prove the facts stated in it.

HATTON  
v.  
PEDIE



LORD MACKENZIE.—You may read it to that effect.

When evidence was tendered of the practice of superiors making up the street opposite unfenced stances,

Evidence of practice admitted as to a matter not provided for in a contract.

*Cockburn* objects.—This is incompetent, as there was here a written contract, and that contract provides that it is to be done by the feuars.

*Bell*.—The only obligation on the feuar is opposite his own feu, and the superior is bound to give free ish and entry, and by the universal practice he is bound to do what common sense shows to be necessary.

*Cockburn*.—The objection here does not relate to the obligation on the defender to give access, but to laying on him additional obligations by the practice of other builders.

LORD MACKENZIE.—There was no understanding by the Court that this was excluded by the issues given; on the contrary, it is left open. A case has occurred not provided for by the contract. This is a forced street, and each feuar is bound to make it up opposite to

HATTON

v.

PEDIE.



his own feu. If the whole had been feued, then each was bound to make it opposite his feu, but here it is not all feued, and this case is not provided for in the contract. As it is not in the contract, it is left to the understanding between the parties, and in proof of this, evidence of the practice may be given. It might be argued without proof of the practice, but the practice may be proved in aid of the contract.

Incompetent to prove a substantive promise as to land by a letter to which no written answer was returned.

A letter by the feuars, to which no written answer was returned by the defender, was rested on in proof of the promise in the second issue.

*Cockburn.*—A verbal communing is not binding in reference to land.

*Bell.*—This is an accessory obligation, and a subsequent promise to execute what he was previously bound to execute.

**LORD MACKENZIE.**—This is admitted to relate to the promise in the second issue, and I think it inadmissible, as it is incompetent to prove a substantive promise by parol. Receiving this would be admitting proof of an agreement by a party in his own favour.

*Cockburn* opened for the defender.—The

HATTON

v.

PEDIE.

pursuer when he took this feu saw that the space was open, and must have laid his account with inconvenience till his houses were completed. It is said the pursuer had right to this by practice ; but he has only proved that the street must be made when the houses are inhabited, and that till then, access is all he can claim, and he had access. The cellars opposite were begun as soon as the pursuer made his. You must attend to the terms of each issue, and not say generally whether you give damages.

*Bell*, in reply, stated the facts, and said, The defender is bound either to build the cellars, or form a road opposite the unfeued stances,—to adjust the boundary, that the pursuer may get a mutual gable,—and to furnish a plan. He acted wrongfully in reference to the pursuer, as he did him a positive wrong ; and it is not necessary to make out that he acted culpably or maliciously.

LORD MACKENZIE.—Much time has been occupied in this case, and I shall therefore proceed at once to the issues.

That the pursuer was to build, must be found in the affirmative. Much evidence has been

HATTON  
v.  
PEDIE.



given on the latter part of the issue, as to the defender building the cellars; but there is no clause in the contract binding him to do any thing where the ground is not feued. When a contract is vague, proof of a universal practice by superiors is material in construing the contract, but in this case you will have to consider whether more is proved than that a superior makes the street when the houses are ready for living in, and whether, till then, the pursuer can claim more than access, which was given in this case. There is strong reason for the practice, and I conceive the law is the same as the practice, and that in this case the defender was bound to give a road, but as the house was not built, that he was not bound to make a street. There is contrary evidence as to the state of the road, which you must consider. There was a total failure of evidence on the second issue, and on the third the question is on the failure by the defender. On the fourth, I do not think much injury was done.

On the fifth, two views of the contract may be taken, the one that the defender was to give the feu as soon as the neighbouring proprietors agreed to settle the march, and no time is limited,—the other is, that it was to be done immediately. It appears to me that this is an un-

dertaking to settle it with little delay. He was bound to settle it in reasonable time, or to give some other line, and pay the damage of the change. The line was not fixed, but on the other side it appears that the pursuer took possession. He has got the same quantity of ground, but says he is deprived of a mutual gable, which was shown on the plan; but you will observe that the feu is said to be bounded by a line, and the defender stipulates that he is not bound by the plan beyond his own property, and he did not warrant a mutual gable. On the sixth issue, there is a failure of evidence; and on the seventh, the only delay after demand is from August to March, and no damage has been proved as arising from it.

You will return specific answers, finding for the pursuer or defender on each issue, and if you find for the pursuer on any, you will fix the damages.

Verdict—"For the defender on all the issues."

*R. Bell and Rutherford*, for the Pursuer.

*Cockburn and P. Robertson*, for the Defender.

(Agents, *H. Fotheringham*, w. s., and *James Pedie*, w. s.)

HATTON

v.

PEDIE.



HUTCHISON, &amp;c.

v.

DUNDEE WHALE  
FISHING CO.

PRESENT,

LORD CHIEF COMMISSIONER.

1830.

March. 8.

HUTCHISON & OTHERS v. DUNDEE WHALE  
FISHING COMPANY.Finding for the  
pursuers in a  
question as to  
the value of a  
whale.AN action to recover the value of a whale as  
wrongfully taken possession of by the defend-  
ers.

## ISSUES.

“ It being admitted that the pursuers, John  
 “ Hutchison and others, are owners of the  
 “ ship or vessel called the Traveller of Peter-  
 “ head ; and that the Dundee Union Whale-  
 “ Fishing Company, of which the defender,  
 “ John Blair Miller and others, are trustees  
 “ and managers, are owners of the ship or ves-  
 “ sel called the Thomas of Dundee :

“ It being also admitted that the said two  
 “ ships or vessels were employed in the whale-  
 “ fishery at Davis’ Straits during the fishing  
 “ season 1829 :—

“ Whether, on or about the 23d day of  
 “ August 1829, a whale at Davis’ Straits was



“ made fast to a boat in the employment of  
 “ the pursuers ; and whether, while the said  
 “ whale was fast as aforesaid, the defenders,  
 “ by themselves or others, struck, and there-  
 “ after wrongfully took possession of and car-  
 “ ried off, the said whale ; and are indebted  
 “ and resting owing to the pursuers in the  
 “ sum of L. 1000, or any part thereof, as the  
 “ value of the said whale.”

HUTCHISON, &amp;C.

 v.  
 DUNDEE WHALE  
 FISHING CO.
 

*Currie* opened for the pursuers, and stated the facts, and that, when a fish is fast to one boat at the time it is struck from another, the fish belongs to the first boat. In the case of *Fennings v. Lord Grenville*, 24th May 1808, the Court recognizes the custom of the fishers as binding, and since then it has been better ascertained. We are ready to prove what *Scoresby* states, Vol. II. p. 319, that, when the whale is entangled in the rope, it is sufficient to fix the right ; and, as in this case, the fish took out line from the pursuers' boat after it was struck by the defenders, it must have been a fast fish.

*Jeffrey, D. F.* for the defenders, said, The law was admitted and it was merely a question of fact, and he would prove the fish loose, and that the line of the pursuers was broken short, but admitted that it would be difficult to reconcile this with the evidence for the pursuers.

1. Taunt. 243.

*Hogarth v. Jackson*, 2 Car. and  
*Payne*, 595.  
*Skinner v. Chapman*, 1 Moody  
 and Malkin, 59.

HUTCHISON, &c.  
v.  
DUNDEE WHALE  
FISHING CO.

Incompetent for  
defenders to  
prove a state-  
ment made at  
the time by one  
of the crew of  
their vessel.

A witness was about to prove a statement by one of the crew of the defenders, that he saw the line broken off before he struck, and it was said to be competent to prove the statement, though it did not amount to proof of the fact.

LORD CHIEF COMMISSIONER.—As this has been agitated, I must decide it, but cannot see how the declaration of a party can be evidence for him.


On his Lordship being requested by the Dean to note this decision, Mr Cockburn gave up the objection.

*Cockburn* in reply, said,—The case was simple ; and to get free of the contrary evidence, they might deduct the crews of both parties, and rest on the facts sworn to by others.

LORD CHIEF COMMISSIONER.—Cases of this kind are for the jury, and the question is, Whether *at the time* the fish was struck by the defenders, it was loose, and not whether it became so immediately after ? If it was loose then, you will find for the defenders, as the custom of this fishing is known over the world, that a fish remaining attached to the boat from which the first harpoon was thrown, at the time it is

struck by a second, remains the property of the first harpooner.

HUTCHISON, &c.  
2.  
DUNDEE WHALE  
FISHING CO.



If you believe that the man of the defenders saw the end of the broken rope attached to the harpoon of the pursuer before he struck, then you must find for the defender, but before coming to this conclusion, you must consider the situation of these men at the time, and ever since the question arose, and that they might unintentionally change the time of breaking from *after* to *before* the striking. They may be mistaken as to the time, but those for the pursuer must be perjured if the line was broken, as they state that it was tight at the time; and you will say whether you think the explanation by the defenders will account for the facts proved to have taken place in the boat of the pursuers, and the fact, that a fish when it gets loose goes on rapidly, but when fast that it rolls. It is uncomfortable to have to do with a case of contradictory evidence, and I could not leave it with you without making these observations.

Verdict—"For the pursuers, and that the  
"defenders are resting owing to the pursuers  
"in the sum of L. 600 Sterling."

*Cockburn and Currie, for the Pursuers.*

*Jeffrey, D. F. and Maitland, for the Defenders.*

(Agents, *J. Kermack, w. s. and Ritchie and Miller.*)

STEWART  
v.  
FRASER.

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PRESENT,

THE FIVE LORDS COMMISSIONERS.

1830.  
March 10.

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STEWART v. FRASER.

On a motion for  
a New Trial, in-  
competent to call  
the Jurors to  
prove that they  
cast lots for their  
verdict.

THIS was a reduction of the sale of the estate of Belladrum, on the ground of misrepresentation. After various proceedings in the Court of Session, the case was sent to the Jury Court. The case was tried on the following

ISSUES.

“ Whether, during the summer and autumn  
“ of the year 1826, and at what time in that  
“ period, the pursuer agreed to purchase from  
“ the defender the estate of Belladrum, and to  
“ pay for the same the sum of L. 80,000 ?

“ Whether the pursuer was induced, by the  
“ misrepresentation of the defender, in regard  
“ to said estate, to enter into the said agree-  
“ ment ?”

At a late hour on the 23d December 1829,  
the following verdict was returned.

VERDICT—“ That the pursuer, by letter

“ dated 4th August 1826; offered the defender  
 “ L. 80,000 Sterling for the estate of Bella-  
 “ drum, which offer was accepted by the defen-  
 “ der by letter from him to the pursuer, dated  
 “ 8th August 1826. Find also that the said  
 “ purchase was further confirmed by contract  
 “ of sale entered into between the said parties  
 “ on the 17th day of the same month of August  
 “ 1826. And on the second issue, find for the  
 “ defender.”

STEWART  
 v.  
 FRASER.  


Notice having been given of a motion for a Jan. 20, 1830.  
 rule to show cause why the verdict should not  
 be set aside, 1st, On the ground that the jury  
 had cast lots for their verdict; 2d, Because the  
 verdict was against the evidence.

LORD CHIEF COMMISSIONER.—It appears to  
 the Court that this must be decided by the  
 practice in England, and there is a case solemn-  
 ly decided in 1805, (which was read in Court,)  
 which is so decisive, that it appears to us we  
 cannot receive the evidence of the jurymen  
 upon which the motion is founded. If, how-  
 ever, parties insist on being heard; it is not for  
 the Court to say they will not hear them; but  
 I thought probably gentlemen at the Bar might  
 have held this case decisive, and as it is not men-

Owan v. War-  
 burton, 1 Bos.  
 and Pul. N. R.  
 326.

STEWART  
v.  
FRASER.



tioned by Mr Grant in his work on New Trials, I thought it better to state it now.

Feb. 2, 1830.

The Court adjourned, that counsel might consider the case mentioned by his Lordship.

When the case was again moved, certain affidavits were produced in support of the motion,

LORD CHIEF COMMISSIONER.—It is clear that if the charge against the jury can be made out by extraneous evidence, other than the oath of jurymen or hearsay, it is quite competent; and with this view the Court wish the officers of Court, who had charge of the jury, to be examined, that we may have before us all the evidence on the subject. It also appears to us more satisfactory to have them examined *viva voce*, that they may be subject to cross-examination.

Feb. 3, 1830.

This course was accordingly followed.

*Cockburn*, in support of the motion.—This verdict ought to be set aside, 1st, As improperly and illegally pronounced; 2d, If it is to be received, then, as contrary to the evidence and the justice of the case.

The jury are sworn to return their verdict according to the evidence; but they entered into an illegal compact to decide by lot. The

relevancy of the objection will not be disputed, and I offer to prove the fact according to the law of Scotland. If this were a purely Scotch case, I would call the jurymen; and if they plead a privilege, I would then argue the question; but it is said this is the time to meet the objection, and that it depends on English practice. I demur to this application of the practice of England, though I admit, and found on the analogy, as its better practice is in our favour. One of the defects of trial by jury in England, stated by Blackstone, applies here. By the later practice, indeed, they reject the only evidence of the fact to impeach the verdict, though they admit it to punish the jurymen. They fine the jurymen for a profligate verdict, but hang the man convicted by them.

The present case being the first here, ought to be decided according to justice and right reason, and we are the less disposed to adopt the English rule, though the Judges resolved that it is the law, because we find the opposite rule to have prevailed a few years before. The case in 1805 is admitted to be a change of the law, and that it is made on the ground of expediency or convenience. We think the opposite decision expedient, though undoubtedly it is not free from danger, but much the greatest danger is in protecting an unprincipled jury.

STEWART

v.

FRASER.

3 Blac. Com.  
381.

Fowler Com.  
Dig. 495. Mel-  
lish v. Arnold.  
Bunbury, 51.  
Aylett v. Jewel,  
2 Bl. Rep 1299.  
Parr. v. Seames,  
Barns, 438.  
Hale v. Cove,  
1 Strange, 642.

Owan v. War-  
burton, 1 Bos.  
and Pul. N. R.  
326.

STEWART  
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In cases of crime, a party when called as a witness is bound to speak, and why is there protection here? There is nothing in the statutes on the subject, and it is essential to the justice of the case to have this verdict set aside. There is no limitation as to the evidence by which this is to be proved, and the Court is bound to do justice to the parties.

The English law is not applicable to us, and there cannot be direct cases on the point in Scotland, but there are some bearing on the question. There was a case for setting aside a cognition tried at Glasgow, where jury-men were called; and in a case in the First Division, where a jury had been called to value land, they were examined by a Sheriff, and this was not disapproved of by the Court.

There is extraneous evidence of the fact, and even by the law of England this would be admitted.

But the verdict is contrary to evidence, and the justice of the case. The note of particulars, containing the number of acres in the estate, and whether they were arable, pasture, or in wood, may not have been the sole inducement to purchase, but it was *an* inducement, and it misrepresented the fact on which the bargain proceeded.

Graham v. New-  
lands, 3 Mur.  
Rep. 531.

Forbes, &c. v.  
Magistrates of  
Aberdeen,  
Feb. 11, 1809.



LORD CHIEF COMMISSIONER.—It is the desire of the Court that both grounds which have been opened should be fully argued and replied to.

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I hope it will be attended to on the affidavits that there are two views in which they are to be taken. *First*, Whether they afford a ground for the Court holding that what is surmised was done ; *Second*, Whether they afford a ground for farther inquiry, by calling the jurymen, if the Court come to be of opinion that they can be called. In some parts of the able argument we have heard, it seemed to be held that they afford sufficient evidence that the jury cast lots for their verdict.

*Skene*, for the defenders.—This motion was Feb. 27, 1830.  
made on a ground which affects the conduct of the jury in returning their verdict, and also as being a verdict against evidence. These are essentially different, the one being, that there was no trial, the other, that the jury mistook the evidence. The relevancy of the first cannot be doubted ; the only doubt is on the evidence by which it is to be proved. The evidence now before the Court does not give rise to the question, as the inference drawn

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by the agent is founded on facts in which he is contradicted by others. The verdict being regularly returned and on oath, you must hold, that, if any proposal for casting lots was made, it was rejected. The only suspicion raised here is on the affidavit of the agent of a party, and it would be extremely dangerous to proceed on it. In one of the cases in England, the oath of the attorney was held not sufficient; and here affidavits are not evidence. No material fact can be rested on the evidence of an agent, except as to instructions for deeds, where he is a necessary witness. In one case in England, though it was proved that the proposal had been made, the Court held that it had not been acted on.

The question here is, Whether you will order the jury to attend and give evidence? There is nothing in the affidavits proving that the jury are ready to admit that they were guilty of this great offence. Suppose they refuse to come when ordered, or if one or two come, are they to convict the others of perjury, and render them infamous? In England it was decided in 1805 with much deliberation, and on a view of all the cases, that jurors could not be called; and in questions of this nature, as in cases of insu-

1 Bos. and Pul.  
N. R. 326.

Hamilton v.  
Hope, 4 Mur.  
Rep. 255.

rance, it is competent to refer to decisions in England. We are prepared to show, that what is now proposed is even more inconsistent with the law of Scotland than of England.

There is no trace of the admissibility of any such evidence in any of our authorities, as referred to by Baron Hume ; and I am not aware of any case in which a *socius criminis* who admitted himself guilty of perjury was received as a witness. Jeffries would not receive this in the trial of Oates. The law of Scotland has a horror at perjury. This is much stronger than if the application had been to correct the verdict on the spot.

2. Supposing this a true verdict, it is said to be contrary to evidence ; but there was evidence to balance, and the Court will not interfere. The pursuer was bound to prove that he purchased on the note of particulars, and that he altered his calculations in consequence of seeing it ; but the reverse was established ; and we showed that he did not buy on calculation but advice. It is no slight misrepresentation which will be sufficient, but must be such as goes to the foundation of the bargain ; and we are not bound to show that the verdict is right on the calculation. It was a fair jury question, whe-

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Howell's State  
Trials, Vol. 10,  
p. 1185.  
Vol. 19, p. 633.  
2 Hume, ch. 15,  
1471, c. 47.  
1476, c. 63.  
2 Hume 270.

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ther he bought on the calculation or advice, and the jury decided it.

March 3, 1830.

*Jeffrey, D. F.*—It is candidly admitted that the allegation is relevant; that, if proved, it is fatal to the verdict; and that the English decisions are not binding as authority here. This question turns partly on the form of process, and partly on the law of evidence; and in neither of these have the statutes introduced the law of England. That law is introduced in cases of treason, but not so in civil cases. By the statutes as to jury trial, a verdict may be set aside when it is essential to the justice of the case. We have been wronged by a verdict; and when we seek redress, we are met by an objection to part of the evidence. It is said affidavits are not allowed by the law of Scotland, and that an agent is an incompetent witness. Agents are not witnesses in the matter remitted to probation, but they are competent in this, which is informing the Court of an irregularity in the trial of a cause. I demur to an affidavit being in Scotland proof of any important fact; it is merely solemn information to the Court of facts, which a party are ready to prove.

The question then arises, Whether the *rea-*

sons of the *recent* law of England are such as to exclude this inquiry. Authorities were promised, but not given, to fortify the English decision ; and the only reference was to a *dictum* of Baron Hume, but that refers to a written verdict in a criminal case. Reference was also made to the old statutes for punishing jurors ; but it is clear from Mr Hume's work, that the common mode of proving the offence was by the jurymen. In 'a case in M'Laurin, doubts are expressed on this subject. *Any* solemn deed may be reduced on the ground of fraud, except a verdict in a criminal trial.

In this case the allegation is relevant, and the injury great ; but an objection is taken to the evidence, and at rather an early stage. It is said the jurors are incompetent, as they must admit themselves perjured ; but that is an inaccurate use of the term perjury.

The rule excluding this evidence is founded on a short-sighted policy, as all inquiry cannot be prevented. The dignity of the Court is already violated by the surmise of such a proceeding, and unless there is an absolute barrier to inquiry in the slightly considered, and rashly adopted, reasons of policy which have been referred to, then justice to the party is the first point. Where *socii criminis* are received,

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2 Hume, 224.

2 Hume's Tr.

270

Nicol.

MacLaurin, Cr.

Ca. 381.

2 Hume, 137.

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and where the *reason* of the English decision is not sufficient, this application is not to be refused on the ground of inconvenience.

On the question of the verdict being contrary to evidence, it is clear that the note of particulars runs through the whole bargain ; and is it to be conceived that the same sum would have been offered if the party had been aware that the note was erroneous nearly to half the estimated rent ?

1830.  
March 10.

LORD CHIEF COMMISSIONER.—In this case a rule to show cause why there should not be a new trial, was granted by the Court. Cause was shown, and we have heard a reply.

The motion is grounded on two points,—*First*, It is said that the affidavits and testimony given before the Court, render it proper to examine the jury whether they cast lots for their verdict ; *second*, It is said that the verdict is contrary to evidence.

In the whole circumstances, it would be a vain pretence in me did I not say that I felt considerable anxiety, as it is the first time in this Court that any serious charge has been made against the jury, and which in its nature must prove very prejudicial to the institution. This charge must have affected all the Court, but was

peculiarly distressing to me, who, for fifteen years, have had my attention at all times and places directed to this subject, and this is the first time that any thing has occurred materially affecting this essential part of the institution.

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This has been argued at the Bar as a question of evidence, and it is said that it must be decided by the law of Scotland. If it were a question of evidence, I would accede to this, as I have always held, that, in questions relative to the legal rights of parties, the rule of the law of Scotland, not England, must regulate. But the frame of the institution is borrowed from England,—the number and constitution of the jury,—their unanimity or agreeing in their verdict,—the redress of error by motions for new trial, and by bills of exception,—the proceeding by special cases, and special verdicts,—in short, all the machinery is English, and reference must on these points be made to English cases. I shall not dispute about words, as to whether the English cases are binding, as the true question is, not whether we are bound by decisions pronounced in England, but whether we shall depart from the practice of a wise nation on a matter of this sort?

If this were a question of evidence, I think I could show, from the course of practice as to

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the admission of accomplices, and a man not being bound to criminate himself, that the law and practice of the two countries is precisely the same, or so nearly the same, as to make it impossible to come to a different conclusion on the question now before us. But this is not a question of evidence ; it is a question as to the constitution of the jury, and that constitution stands in the way of the question of evidence. I do not, however, rest the distinction on the practice of the two countries further than to say, that the question cannot be supposed to have arisen in the Criminal Court of Scotland, where the jury decide by a majority.

What I have to state relating to the constitution of the jury is independent of their number, or the necessity of their agreeing in their verdict. The constitution, so far as it relates to the sacred nature of a verdict when given, is the same in both countries, but, supported as I am by such great authorities on each side of me, I shall not go with minuteness into the question as it relates to the rules in Scotland. Whatever discrepancies there may have been, Baron Hume speaks sound sense when he says, in the passage referred to at the Bar, that the utmost danger and uncertainty would be the consequence if questions were to be raised against



the verdicts of juries by examining the jury themselves after their verdict was delivered and the jury discharged and separated, and liable to be influenced elsewhere. Here the jury consists of twelve—they must agree in their verdict—their time of deliberation is limited to twelve hours—this was introduced for the wisest purpose, as at the time trial by jury was introduced into Scotland there was a strong feeling that unanimity in the jury might render a sacrifice of conscience necessary. That can never be necessary here; and we are freed from the ridicule which has been cast on England that strength of body, not of conviction, decided the verdict.

In reference to this question the constitution of the jury may be viewed in three points; *1st*, Their mode of receiving information; *2d*, Of deliberating; *3d*, Returning their verdict and recording it. The first is all in public, and is wisely so, as the institution could not go on satisfactorily without this. It secures attention and correct behaviour during the longest trials. But jurors are not like us to deliberate in public. With respect to Judges, it is proper that their judgments and the reasons for them should be discussed in public, but jurymen are unaccustomed to public discussion, and require quiet

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retirement, and it is essential that they should not be interrupted from any quarter. At first the views of some may be crude till aided by the others, and they are not to be spied in the steps by which they come to agree. If juries are not fit for distributing justice, unless their deliberations are under inspection, then the country is not fit for trial by jury.

As to the English cases, it is essential that they be well considered, and I am satisfied, that, notwithstanding all the research which has been employed in them, they have not been so fully brought forward as they might have been, and it is fit the principle should be better sifted. It appears to me that the cases have never been fairly before any court, and that the later cases have merely enforced the original decisions. I have gone through the argument of counsel and the cases minutely, and shall state the result. The first case was Lord Fitzwalter's in 1675, in which it is merely stated that the verdict was to be set aside, as the jury had cast lots ; but there is nothing in it to show that the jury were examined ; and the circumstances tend to show that they were not, as they were punished. The case was under Lord Hale, and the presumption is, that every thing was regular. The next case

is that of *Fry v. Hardy*, of which there are several reports, but the best is that by Sir Thomas Jones, and in this case the jury were not examined. The only others till the cases reported in *Strange* is the case of *Mellish v. Arnold* in 1721 in *Bunbury*, and there is no evidence that in it the jurors were examined. The next case is that in *Strange's Reports*, *Hale v. Cove*, in which it does not appear that there was any examination of the jury, and it is cited in the case of *Vasie v. Delavel* in 1785, when Lord Mansfield refused to receive the affidavit of the jurors—but in 1735, in *Parr v. Seams*, and in 1736, *Phillips v. Foster*, in *Barns's Notes*, the affidavits of the jurors are, for the first time, received. In the case of *Aylett v. Jewell*, in 1779, reported by Sir W. Blackstone, the Court seem to have intended to examine the jurors, but did not. The next case is the one which was decided by Lord Mansfield in 1785, who went to the original cases, and refused the affidavits. In that case, and in the one decided by Sir J. Mansfield in 1805, they resort to the original principle of the law of England—they do not introduce a new rule, but return to the old law, which had been improperly deserted.

In the case in 1805, all the Judges concurred;

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Bunbury, 51.

and at that time Lord Ellenborough was at the head of the Court of King's Bench, and of the Common Law of England; and it is not unworthy of notice, though a minute circumstance, that he, as counsel, moved for the admission of the affidavits in 1785, which would draw him to consider the cases previously decided; but even, with the impression which is made by cases at an early period of professional life, he agreed with the other Judges, who disregarded the cases reported in *Barns*, and returned to the original rule, when the wisdom of the Court held that the jurors could not be examined. I have alluded to the case of *Mellish and Arnold* in 1721, but omitted to state the particulars. In that case the Court were satisfied by extraneous evidence that the jury had got a large sum of money. This case establishes the principle, that if the misconduct is proved by other evidence, the verdict will be set aside—it also establishes that if the jury come to exculpate themselves, the Court will receive them—but inculpation and exculpation are in a very different situation. What goes to establish a verdict may be received, but what goes to defeat it will be rejected. The rule is held so trite in England, that in 1828, when Mr Brougham moved for a rule, as in the present case, Lord Tenterden said, You

do not move on an affidavit of a juryman? and Mr Brougham acquiesced.

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This brings us to the consideration of how far there is any danger in following these decisions, or, if I may use the expression, whether expediency should lead us to swerve from the practice as established in England. In something less than 200 years, within which period the practice of granting new trials has become more frequent in England, there have been seven or eight cases where this point has been mooted. In two of these the jury have been examined, and in the others not. Has rejecting this inquiry, I may ask, injured the course of justice, or weakened the confidence of that country in their juries? In this country, where I have always reported favourably of the juries, is it probable that they will put on a different character now, especially when they know that they will be relieved in twelve hours, if they cannot then agree?

The right to examine the jury having been stated at the Bar, and earnestly enforced, I have thought it right thus fully to consider it on general principle, as it is our duty, not only to administer justice, but to give satisfaction in its administration. But I must now view this as a question of fact; and how does it stand?

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The verdict was regularly given; there are two affidavits, and the examination of the officers on which this motion is founded. I shall not say any thing on the point of the affidavit being by the agent, but shall go at once to the facts stated in his affidavit, and upon which it is said we ought to examine the jury. The first fact sworn to by Mr Shepherd is, that a hat was called for, but in this he is not confirmed, as the officer proves that all the hats and great coats were given them, but that one hat was not found till after they were released. Though I have no doubt Mr Shepherd's conviction is honest, this proves that he had not correctly observed the fact. The next is, that he heard tearing of paper, and in this he is confirmed by the officer, who also adds that he heard them say take or call the votes. The next is the noise of a pen on paper. The tearing of paper, and the writing is accounted for by the jury having written their verdict, and the hearing the noise of writing, would not be accounted for by their having merely written the letters P. and D. for pursuer and defender on two slips of paper. If, therefore, I thought the evidence of the jury could be given, I would say that in this case it ought not to be given, as the facts sworn to are

not sufficient to raise the question of their admissibility.

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Suppose the jury could be examined, what becomes of their private communication? If their communication is not to be private, then they ought in all cases to be watched by those who can give correct evidence on the subject; and would the legislature be disposed to subject them to this? If, at the end of fifteen years' trial, the country has not confidence in its juries, then the country is not fit for trial by jury. This is all I have to offer on the question of setting aside the verdict on this ground, or, as the Dean of Faculty said, on the point of examining the jury. On this point, my voice decidedly is for discharging the rule.

On the second ground, on which the motion is rested, viz. That the verdict is contrary to evidence, I do not think the case was put in all the views in which it might be presented, and that, therefore, we ought to have a farther hearing on this point by one counsel on each side; but this cannot be till May. I shall, however, state the points to which the argument ought to be directed.

The written note of particulars on which this turns is not, in fact, met by contrary evidence, but is avoided by stating, that the sale did not

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proceed upon it, but that the pursuer acted on the advice of Mr Fraser of Fingask ; and the question is, Whether the advice supplanted the note ?

On the 1st of August, the pursuer writes under the impression of the note ; on the 2d, Fingask, being ignorant of the note, writes, advising him to give L. 80,000 ; on the 4th, the pursuer offers this sum without mentioning the note ; on the 7th the defender writes to him ; and, on the 8th, the pursuer answers, concluding the bargain.. Then, at a subsequent period, a minute of sale is entered into. The meeting for this purpose was on the 17th, and was in consequence of a letter from the defender on the 14th. Just before the minute of sale is entered into, a paper is given to the pursuer, dated also on the 14th, which revives the note of particulars, and goes through a number of the statements in it, but does not mention the number of arable acres. The question is, Whether this was not an act on the part of the defender which revived the note as his act, and whether the note or the advice of Fingask was the inducement to purchase ? Whether, though it may not have been the ground of the offer, it was brought forward before the conclusion of the sale, to influence the mind of the pursuer ?



LORD PITMILLY.—As I concur in the opinion now delivered, it is unnecessary for me to go into detail ; but I shall say a few words on the law of Scotland, as it bears on this interesting question, Whether a jury, after having gone through the solemn ceremony of delivering their verdict in presence of a Judge, declaring it to be their verdict, and witnessing its being recorded, it is competent for them, *ex intervallo*, to challenge it as improperly obtained ?

The mere statement of this question is sufficient to show that there is a radical error in supposing that an answer to it is to be found in the common rules of the law of evidence ; and that, if there is nothing in that law to exclude the jurymen as witnesses, the question must be answered in the affirmative. If it did not appear at first sight that this is not a question on the law of evidence, we should be satisfied on this point by looking into our law books, where there is a long enumeration of the qualifications and disqualifications of witnesses. This is the case both in Phillipps and Tait ; but there is not a word in either of these works, especially in this part of them, on the competency of jurymen impugning as witnesses their own verdict.

If this were a common question in the law of evidence, I see much difficulty in excluding the

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testimony ; for though it would be received with much suspicion, still it is difficult to say that it is incompetent. We admit instrumentary witnesses, though they are liable to the pains of forgery. I could not go along with this part of Mr Skene's argument, and feel a difficulty, in this view, of rejecting the testimony.

There are *situations*, however, in which persons, though admissible on ordinary principles as witnesses, yet, on higher grounds, cannot be admitted or called upon to give evidence. A Judge in a supreme court is in this situation, and if in a subsequent trial it is necessary to ascertain the facts, he is not to be called on or permitted to give evidence. In one case tried before your Lordship, this was permitted by consent of both parties, and it being stated that the parties were taken by surprise if it was not allowed ; but on that occasion the Court laid it down distinctly that it would not again be allowed. Though he is the best witness, he is not permitted to give evidence, but the case of a jurymen is infinitely stronger. The reason of the exclusion is, that subjecting a Judge to cross-examination, &c. would prove prejudicial to the administration of justice ; and this principle applies more strongly to the case of jurymen if they are to be allowed to impugn their verdict. If their

Harper v.  
Robinson, 2  
Mur. Rep. 385  
and 404.

evidence of such a proceeding is allowed, there is no end to it; for though in this case, it is said they all cast lots, and that they will prove it, still the same must apply to a part, or even to one casting lots for the verdict he is to give. This, if admitted, would put an end to all security in verdicts. We must trust to the integrity and intelligence of jurymen; and were we to permit this examination, it would give a fatal blow to this mode of trial. Expediency controls the common rules, to the effect of admitting objectionable witnesses, and also of refusing unobjectionable. A *socius criminis* is admitted contrary to the common rules. These rules bend to expediency—to public policy; and though, by the common rules, Judges and jurymen would be admissible, on the ground of public policy they are not admissible.

On this subject it is unnecessary to refer to authority, when none is brought against it. The only authority is the case of the Magistrates of Aberdeen, 11th February 1809, referred to by Mr Cockburn, and that case appears to me to be on the other side. In that case, the jury had not gone before the Judge and delivered their verdict, but the clerk had gone privately to the Judge, and it was decided that that was not a good verdict, and that the jury might be

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2 Hume, Com.  
2d Edit. 412.  
M<sup>r</sup> Laurin's  
Crim. Cases, No.  
78 and 61.

examined on the subject. But there is more direct authority than this in Mr Hume, and the doctrine he states is confirmed by two decisions referred to. I have no doubt that juries were occasionally called before the Privy-Council ; but I do not think this militates against the view we take of the subject ; and in a question as to intercourse with the jury, they have been examined. But in these the Court followed out the act 1587.

But there is no case where they have been allowed, with the approbation of the Court, to impugn the verdict after acknowledging it. There was one case which has not been referred to, where at Glasgow it was stated, two days after the verdict was returned, that five of the jury had not been sworn. This was certified to the High Court of Justiciary, and in the hurry of the Circuit, the Judges examined the jurymen, but on reviewing the case, the Court disapproved of this, and sustained the verdict. The verdict was sustained on the ground, that the record was not to be questioned. It is admitted by Mr Skene that this is a relevant objection. I think something might have been said on this subject ; but taking it as relevant, I rest on the case at Glasgow as proceeding on a different principle. It will be seen from the

Burnet Cr. Law,  
477.  
Case of Hannay  
in 1809.

report in the appendix to Mr Burnet's work, that the Lord Justice Clerk and Lord Meadowbank both disapproved highly of the examination, and this is the only case in which the thing was done, and there it was disapproved of.

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Burnet, App.  
p. 70.

There is another case of the same nature, where a juryman was incautiously examined, but not on oath, and in that case there was a host of other evidence. I believe that case followed the precedent of that of Menzies in 1790.

Sharpe in 1820.

On the authority of Hume—of the cases,—and on principle, I have not a doubt that this evidence is inadmissible, according to the sound principles of the law of Scotland, and were it admitted, the consequence would be most prejudicial to this institution, and to the administration of justice.

Even if our law was not so express as I think it is, the English authorities would be satisfactory. I never had a doubt on the subject, and my only difficulty has been to keep my mind disengaged, and to attend to the arguments offered. On the whole, I think it inadmissible, and that it would be most prejudicial to the ends of justice to admit it.

I also concur in thinking that we should hear farther on the other point, before proceeding to decide it.

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LORD GILLIES.—If it was unnecessary for Lord Pitmilley to say much, it is still less necessary for me, as I concur entirely in all that has been stated by your Lordship, and by him. I concur in the opinion, that this is not a question of evidence, but practice, and I thought, and still think, that, in a matter of this sort, English cases are almost as binding here as in England. This case presents itself in a new point of view on the affidavits, as it does not appear to me that the affidavit of Mr Shepherd amounts to what could be called presumptive or *prima facie* evidence. I cannot even say that it raises any very strong suspicion, as the circumstances are much done away by the facts sworn to by the officers of Court. He is a man of integrity, and swears to his belief; but that is not sufficient, as the grounds on which he rests the conclusion do not amount, in my opinion, to a *semi plena probatio*. Were we, on this affidavit, to allow the examination, it would amount to this, that we must in all cases admit it on proof of the belief of a party or his agent. In general, an affidavit ought to be made to a fact sufficient to set aside the verdict.

It was said that instrumentary witnesses were examined; but their case, and that of a jurymen, is very different. They may be witnesses or not

as they choose ; but jurymen must attend. If proof is admitted that all the jury cast lots, where is it to stop ? Suppose one jurymen is bribed, or that one went on the opinion of another, are they to be examined ? Such a principle would prove fatal to the institution. I therefore concur entirely in the opinion delivered.

On the other point, I think that there should be farther argument.

There was a case tried where I was the Judge, and where jurymen were examined, but there was no room for the present question. It was a reduction of a cognition, and the allegation was, that the person was a rogue, and feigned himself mad ; but in that case the persons who were on the first jury were called, not as jurymen, to support or do away the verdict, but as persons acquainted with the man cognosced. It was a clear case, and the man having been before the first jury, and not being produced to the second, I said they ought to find for the defender.

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Graham v. New-  
lands, 3 Mur.  
Rep. 531.

LORD CRINGLETIE.—I heartily concur in the opinions delivered, and my difficulty was the same as that felt by Lord Pitmilley, to keep my mind disengaged. On the principles of the law of Scotland, if there were no other autho-

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rity on which to reject it, I think this inadmissible. A jury is to be kept apart—inclosed—and are so sacred, that, if any one went with them, the verdict is null; they are debarred from intercourse with all mankind; and their verdict is held to be truth. In this case the jury delivered their verdict, and declared it theirs, and after this, and after they have had intercourse with others, are they to be allowed to annul their verdict? It would be contravention of the whole system; and I concur in the principle that it is incompetent. When there was an assize of error, they must examine the jury; but if this was competent on general principles of law, there was no use for a statute; and why was the Act 1471 passed?

I concur also as to hearing farther argument on the other point.

LORD MACKENZIE.—As I agree in the result, I shall not go into detail. I agree as to the affidavits and other external evidence, that what is sworn to is perfectly consistent with the fact, that there was no misconduct on the part of the jury; and the question comes, whether, in these circumstances, the Court can order the examination of the jury to annul their verdict. I doubt, if this objection goes merely to



granting a new trial, it would go the length that there was no verdict. If this were admitted, I see no limitation of time within which a verdict may not be questioned; and I do not know if a judgment following on it would confirm it; and I suppose it would require forty years to cure it. It is plain that in a question of this sort there is no limitation to acts of misconduct,—one may swear that *he* misconducted himself, which, if disclosed before the verdict is returned, might render it null. Would you allow one to swear that he drew lots for what he was to say? This would be contrary to the nature of this or any other institution where the deliberation is private.

If this were an open question,—if there were no authorities on the subject,—I should feel extreme difficulty in admitting any procedure on such an allegation, especially by calling the jury to impeach their own verdict. In 1787, the rule was laid down in this country, and it is clear that at the time this Court was established this was also the rule in England. If, then, it had been intended to fix a different rule here, would not the legislature have altered this at the time it copied from England the other grounds for granting a new trial? But there is no indication that our proceedings in

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this matter was to differ from the laws of both England and Scotland.

On the other point I concur.

A New Trial  
granted, the  
Jury not having  
given due weight  
to a material  
piece of evidence.

During the Summer Session, the case was again brought before the Court, and, though I was not present when the New Trial was granted, the following note may be relied on.

LORD CHIEF COMMISSIONER.—The question, whether there was actual misrepresentation, is not one which it is necessary to consider, because it is allowed, and was sufficiently established at the trial, that a paper entitled, Note of Particulars, did represent this estate to be very different from the result brought out by admeasurement. Therefore, as to the fact of there being misrepresentation, I shall not say more.

The question as to the influence of that misrepresentation upon the transaction between the parties, is this,—The pursuer contends, that the representation in the note of particulars was a material inducement with him to make the purchase. He does not confine himself to its being the sole inducement, but to its being an inducement, and a most material ingredient in leading him to make the purchase. The defender contends that the note of particulars,

and the representation in it, is to be entirely excluded from the transaction, and that the sale must be held to have been made in consequence of the advice of Mr Fraser of Fingask. So there is an exclusive proposition maintained, viz. that the note of particulars did not induce the purchaser to make the bargain ; and the jury have found by their verdict, that it did not induce the pursuer to make the purchase.

In considering this case, the evidence on which it depends should be distinctly characterized and well understood. On this part of the case (the inducement) there is not one single iota of parole evidence. The only testimony by a witness is that of Mr Fraser of Fingask ; and his evidence was taken on commission. So that even that evidence appeared in writing, and therefore can undergo no variance in looking at it now and at the trial. The other parts of the evidence are letters, and some very few documents. All these may be resorted to in the very same state in which they appeared at the trial. They can make no different impression, then or now, other than what arises from the mode of reasoning on the facts they represent.

It is necessary that dates should be particularly attended to. The first piece of evidence, in

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point of date, is a letter of the 27th July 1826, from Mr Fraser of Fingask to the pursuer, in which he intimated, that Mr Fraser, the defender, intended to sell his estate of Belladrum. It is contended, on the part of the defender, that his advice was the pursuer's inducement to make the purchase. The parties were brought together by a letter of the 29th of July 1826; and on the 30th, there was delivered by the defender to the pursuer, what is called the note of particulars. It was delivered to Mr Stewart by Mr Fraser, the seller of Belladrum, in the house of Fingask, but, as appears from Fingask's testimony, without any intimation to him that the paper was delivered. It was taken home by Stewart, who, at the meeting had stated, that he was ready to give L. 70,000 for Belladrum. It appears that Fingask had instructed him, that he might bid from L. 70,000 to L. 80,000; and if he came up to that sum, he would not make a bargain that either he or his family would regret. He took the paper with him to his residence near Nairn; and after its being forty-eight hours in his possession, he writes a letter on the 1st of August, saying that he was ready, in consequence of having perused the note of particulars, to bid L. 75,000. Belladrum receives this

letter on the immediately following day, offering L. 75,000, induced by the note : Belladrum sends this offer to Fingask, and asks him to make a communication again to Mr Stewart. Belladrum then writes a long letter, dated the 2d of August, upon the subject to Stewart. Now, in this letter, he takes no notice whatever of the note of particulars ; yet it is an answer to the letter which mentions the note as the inductive cause of the offer of L. 75,000. The note is thus allowed, by this silence on the part of Belladrum, to remain on the mind of Mr Stewart, the pursuer, as a representation of the particulars of the estate ;—there is nothing said to vary its operation on his mind ;—the defender does not repudiate the note ;—he does not say that you ought not to have rested your calculation on the note ; he does not say that doing so was altogether foreign to his purpose ; he does not repeat what, it is said, he mentioned at the meeting, that it was merely made up to give information to a bank for a loan, and was never intended as the data for a purchase. He says nothing about it at all,—but allows the note, at this date, to remain, to have what influence it may on the mind of the pursuer.

The next step in the case is, that Mr Stewart, the pursuer, made a second offer, ad-

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vancing to L. 80,000 ; and, on that occasion, he does not again mention the note, but there is an expression in the letter containing that offer which deserves to be attended to. It is dated the 4th of August. The expression is, " Taking " all the matter relative to this subject into consideration, I offer you L. 80,000." Then all the matter, it should seem to me, must refer to all that had been made the subject of consideration,—whatever had been represented by Fingask,—whatever the pursuer derived from his own knowledge of the estate, or the impression which the appearance of the estate might have made upon him,—whatever had come from the perusal of the note of particulars, for the note had not been withdrawn from consideration, it had not been repudiated, but had been allowed to remain to make an impression, and to operate together with the other inducements. No answer was sent to this letter of Stewart's of the 4th of August ; and he wrote again to the defender on the 7th of August, requesting that he would come to a determination respecting the sale. On the 8th of August, Belladrum writes, accepting of the L. 80,000, and making some subordinate observations. In this letter, he allows the note of particulars to remain precisely where it was ; he does not remove any

impression made by it. In a day or two after, on the 10th of August, Mr Stewart, the pursuer, writes to Belladrum, the defender, requesting a general view of the public burdens on the estate, saying, they did not appear in the note of particulars. Here the note of particulars is again brought under the view of the seller by the purchaser, as a document to which he had made reference. Then comes the question, and it is most material indeed to consider it, How the seller considered this request, and what he does in respect to it? He sends a most minute statement of the burdens, more than was required, not only stating usual public burdens, but the assessed taxes; still he does not in this letter, which is written on the 13th, (a delay caused by his being absent from home when the letter of the 10th arrived at Belladrum,) make any observation with regard to the note of particulars. Here then, is a letter advancing a step further, in which the note is specifically referred to again by the pursuer. The defender returns an answer as to the matter inquired about, but he makes no observation upon his reference to the note of particulars, derogatory of its authority. This is a little more than mere want of repudiation, because it is a second instance of its being brought

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under the notice of the defender, as an instrument to which the pursuer was in the habit of referring. In this situation matters stand till Mr Stewart is desired by Mr Fraser to come to his (Fraser's) house, or to receive him at his (Stewart's) residence near Nairn, for the purpose of concluding a minute of sale. This ends in a meeting at Wilson's Hotel in Inverness. They met on the 17th August. A minute of sale is there drawn out, and that minute makes the concluding part of the transaction ; whether this minute is to be set aside, depends on the Court of Session, and they depend on the verdict of a jury.

It appears that, on the 14th of August, Belladrum drew up a memorial of observations on the note of particulars ; that memorial is not delivered till the day of meeting, (the 17th ;) nor do I mean to attach any unfairness to this delay. It is put into the hands of the purchaser before the minute of sale was begun to be drawn out. That memorandum appears on slight inspection, as well as by minute examination, to be a memorandum prepared at the instance of Belladrum, or by himself, upon the note of particulars. It was made matter of considerable observation at the trial. I will not pretend to say from recollection, that I am,



at this distance of time, master of all the ways in which it occurred to my mind at that time ; but this I feel, that it did not occur to my mind in the prominent way it has done since, as to its effect on the note of particulars. I treated it chiefly as referable to the inaccuracy of value of the estate as represented in the note of particulars. Now, by attending to this memorandum with repeated and minute deliberation, I am led to consider it as a paper advancing a most material step beyond any yet stated respecting the note of particulars. In the first letter, the note is not repudiated by the defender ; in the second instance, it is not mentioned by him at all, although it is twice represented in writing as a paper to which the pursuer had reference in considering the amount he should offer. Then, notwithstanding the letter of the 13th, in which the defender makes no allusion to the note of particulars, we find that he had, on the 14th of August, completed the preparation of this memorandum, produced on the 17th. It is prepared by the defender as a commentary on the note of particulars, which is now no longer not repudiated, but is recognized and commented on in all its parts, with the exception of two items. It does not take notice of the woods, nor the thinnings,

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nor is there any reference to the difference between the arable land sold, and the arable land actually existing. Omitting those items, it is the object of this memorandum to show, that the note had contained statements under, rather than over, the truth ; and in one place he says, that it may be necessary to state these particulars in order to prevent after differences. Here then is a recognition of the note, nearly three weeks after it had been passed over in silence. It is the defender who brings it forth again as a document for consideration by the pursuer, as a representation of the estate. It is evidence of the highest character that any case admits of. It is the defender's own deliberate act explaining and amplifying the character of the document, and setting forth the object he had in communicating on it to the pursuer. It proves, by his own deliberate act, that he, (the defender,) considered the note of particulars of great importance in the sale of the property ; must it not then be taken as an inducement to the pursuer to purchase ?

I have not been able, from the moment of the trial down to the present time, to relieve my mind of the impression, that the jury overlooked this view of the case ; that they did not take a correct view of all these circumstances.

And they went on a ground they ought not to have gone on, when they excluded the note of particulars from the inducement to purchase.

This memorial on the note of particulars, proves, by the act of the seller, what he thought of it, as calculated to influence the purchaser.

All this is of importance, especially when applied to the statement made with respect to the alleged advice of Mr Fraser of Fingask. No doubt, Fingask advised the purchase ;—no doubt, he was anxious for a sale. He had more motives for this than one. No doubt, he knew the estate, and represented its advantages to the purchaser in the course of the transaction. No doubt, the second offer was made by the advice of Fingask, without his mention of the note, and that Stewart did not then refer to it. From thence, there is a strong presumption, that this advice had a share in bringing the purchaser to a determination ; but not that the note of particulars should be put entirely out of the question, and the advice made the only ground of the verdict. Upon that, the question arises ; Is a jury right who act on a presumption, and exclude evidence of this high nature from their consideration, and from making a component part of their verdict ? Can it be allowed that this note of particulars had no influence, and

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was not an inducement in making the purchase of Belladrum ?

On all these grounds I have no hesitation in saying, that this case ought to be tried again. I shall only farther observe, on two points, which must always occur in the anxious consideration necessary in granting new trials. The first is, Has general justice been obtained by this verdict ? The question is not, whether the purchaser has had a good or bad bargain, but whether he was induced, by such and such means, to enter into the purchase. The justice of the case consists in our being able, here, a delegated Court, to send back to the principal Court, issues on which we can conscientiously say there has been a correct finding. If we feel convinced that there has not been a correct finding, we ought to say, that this case must be tried again, in order that another jury may give a correct verdict. The other is a general point, Whether there will be any encroachment on the province of the jury ? I do not mean to enlarge on this topic, because the same consideration is brought under our notice in every case of new trials. But if ever there was a case safe from the risk of that encroachment, this is it : There is no parole testimony,—nothing in the appearance of wit-

nesses,—nothing in the way in which they gave their evidence, or in their character, or the contradictory nature of their testimony. None of these matters, all of which it is more peculiarly the province of a jury to judge of, could have had any influence on the present occasion. Upon the question of misrepresentation and inducement, it is all written evidence, so that there is a security against even the appearance of an encroachment upon the province of the jury. I do not mean, however, to insinuate, that, had the same testimony come in the shape of oral evidence, and had the same facts been brought forward in that way, I would not have drawn the same conclusion ; but it is a satisfaction to my mind, and it may be to that of the other Judges, that there is this additional consideration for granting a new trial, even although we could not otherwise have considered it to be an encroachment on the jurisdiction of the Jury.

Lords Pitmilley, Gillies, and Mackenzie, expressed their concurrence in this opinion.

LORD CRINGLETIE.—I regret that I am single on this occasion, but, as duty cannot be dispensed with, I will state my reasons for being

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so. The issue is, "whether," &c. and the question is entirely, whether the note of particulars so much relied on by Mr Stewart misled him to make this purchase; or whether he would not have made it if the note had never existed? It being my opinion that he would, I should have concurred in the verdict; and the plea for setting it aside, being that it is contrary to evidence, I must be excused for giving my vote against the motion. When we look at the correspondence in this case, I cannot see how it is possible to do otherwise.

The first suggestion with regard to the purchase is made by Mr Fraser of Fingask, and his letters prove him to have been more the friend and ally of Mr Stewart than of Belladrum.

[His Lordship then quoted several passages from the correspondence, to prove that he was so, and to shew that Mr Stewart acted on his advice, both before and after seeing the note of particulars, and that after Belladrum refused the offer of L. 75,000, Fingask again advised the pursuer to offer L. 80,000.]

From this correspondence, I cannot draw any other conclusion than that it was by Fingask's advice he made this offer. We have no reason whatever to suppose that Belladrum did not

give every proper explanation when he delivered the note. What he says just comes to this, If you look on the note as a correct measurement, or any thing else of the kind, you will not make that use of it which was intended ; but if you wish for a measurement, there is a person at present employed in making a survey of the property:

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There is no statement in the memorandum which can warrant us in supposing that Belladrum considered the note of particulars to have been founded on by Mr Stewart ; and it does appear to me that the purchase was made, not by the misrepresentation of the seller, but by the advice of a person who had been factor on the estate for fifteen years in absence of the proprietor.

But it has been urged that there should be a new trial, because the verdict is contrary to the opinion of the Court, and that the evidence being written, the conclusion from it must at all times be the same ; but does it follow that every one is to be of the same opinion, though the evidence remains the same ? There may be as good ground for difference of opinion on written as on parol testimony. I do not see why the Judges should decide on this, more than on the parol evidence, as both were laid before the

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jury for their decision ; and if this is to be decided entirely according to the opinion of the Judges, it ought not to have been sent to the jury. But there was conflicting evidence ; and are the jury not to decide in such a case ? I apprehend that most unquestionably they are.

I am not much acquainted with English law ; but I am sure that, according to the spirit of that law, we cannot say that this verdict is contrary to the evidence. Before a new trial is there granted, it must be shown that the verdict is contrary to all the evidence ; and it must be so clear that it is impossible for any one to think otherwise. Wherever there is ground for a doubt on the import of conflicting evidence, there is no instance of a new trial being granted, particularly where the verdict is consistent with justice. Allowing a new trial in this case is contrary to practice, and a dangerous attack on the privileges of the jury. I have not only looked into Mr Grant's book on New Trials, but also the authorities referred to ; and it is laid down in one and all of them, that a verdict is not to be disturbed where it is consistent with justice, even although contrary to the opinion of the Court. In Ashers's case, the rule was discharged. Lord Kenyon has laid it down, that where the jury may have had something



to go on, the question is, whether their verdict is agreeable to justice, and if so, it will be sustained. Even objections in point of law have in some instances been got over to support a verdict.

Where is the justice of this case? It is said the pursuer founded on the note of particulars, and it is clear that that note was not consistent with truth. But what is Belladrum's conduct when he found that the pursuer rested on it? He writes immediately, allowing the pursuer to resile if he either considered himself to have been imposed on, or that he had paid more for the estate than it was worth. When this is refused, must we not hold that the pursuer had a good bargain.

By the law of Scotland no such claim is competent, as for a diminution of price on account of the subject purchased not being worth the money paid, or agreed to be paid for it. The law is, that the subject must be abandoned, or the price of it paid. All our authorities are agreed that there is no such action recognized as that of *quanti minoris* in the Roman law, and if Belladrum had here taken his position, the present question could not have occurred. The pursuer would have been told, you must either give up the bargain or abide by it. I do

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not know how Belladrum was led to enter into this question ; but it appears to me that we shall be giving a decision against law and justice if we disturb this verdict. This is what in England would be called a hard case.

I am sorry to be obliged to differ from your Lordships ; but it is impossible for me to give a vote contrary to my understanding, and contrary to my conscience.

LORD CHIEF COMMISSIONER.—The effect of what has been delivered by the majority of the Court is, that there must be a new trial. I have not the least intention of resuming any thing on the merits of the question. But I have to observe, that it has always been my wish to bring matters to such an understanding in the Court, on all subjects, by discussion and intercourse, as to produce agreement in opinion. I can never fail to recollect, what ought to be impressed on every mind, the great benefit which justice derived by Lord Mansfield's pursuing this plan. That illustrious Judge, in the great question of literary property, mentions this in a way to show the advantage which justice derives from the Judges advising together ; and Sir James Burrows, his reporter, by his remarks in another case, where a second

difference of opinion arose, states with what correctness and purity these discussions and conferences had been conducted. Lord Mansfield says, that he had presided in the Court seventeen years, and that this was the first instance of a difference of opinion.\*

I am sure there is not a more conscientious

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\* Lord Mansfield says,—This is the first instance of a final difference of opinion in this Court, since I sat here. Every order, rule, judgment, and opinion, has hitherto been unanimous. That unanimity never could have happened, if we did not among ourselves communicate our sentiments with great freedom; if we did not form our judgments without any prepossession to first thoughts; if we were not always open to conviction, and ready to yield to each other's reasons.

We have all equally endeavoured at that unanimity upon this occasion; we have talked the matter over several times; I have communicated my thoughts at large in writing, and I have read the three arguments which have now been delivered. In short, we have equally tried to convince, or be convinced, but in vain. We continue to differ; and whoever is right, each is bound to abide by, and deliver that opinion which he has formed upon the fullest examination.—*Millar v. Taylor*, Burrow's Rep. Vol. 4. p. 2395.

It is remarkable, that, excepting this case, and another, (the preceding,) there never has been, from the 6th November 1756 to the time of the present publication, (1770,) a final difference of opinion in the Court in any cause, or upon any point whatsoever. It is remarkable too, that, excepting these two cases, no judgment given during the same period, has been reversed, either in the Exchequer Chamber, or in Parliament; and even these reversals were with great diversity of opinion among the Judges.—Burrow's Remarks on the case of *Perrin*, &c. v. *Blake*, Vol. 4. p. 2582.

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Judge, or one who is more desirous to meet the ends of justice, than the learned Judge who now dissents from us. I shall only add this, and no more, which is, that the learned Judge has referred to some of the views taken of cases of new trial in England, and to some other matters which relate to the discretion used there. To this I shall make no detailed reply now ; but it is my duty to say, that I cannot help believing, that, on full consideration, it will be found, that the precise purview of these cases has not been rightly understood. It would ill become me to have said any thing of this kind, had it regarded a question of Scotch law ; but where it is upon the law of England, the case is different. In the law of all countries, those who have practised in the particular law, acquire an understanding of the cases, especially in matters depending on discretion, which no course of reasoning, or reading, can adequately supply. Possessed of this, in relation to the law from which this system is taken, I cannot admit that there are any grounds whatever for inferring that we have, in the most distant degree, infringed upon the privileges of the jury.

*Mr Skene.*—It has been hitherto the practice to grant new trials only on payment of costs.

*The Dean of Faculty.*—I know of no such general rule : I rather think the ordinary practice is to divide the costs.

*Mr Skene.*—Most indisputably not.

Order given for a New Trial on payment of costs.\*

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*Jeffrey, D. F., Hope, Sol.-Gen. and Cockburn, for the Pursuer.  
Skene, Buchanan, and Robertson, for the Defender.  
(Agents Carnegie & Shepherd.)*

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PRESENT,

THE LORD CHIEF COMMISSIONER.

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CRAWFORD v. MILL, &c.

1830.  
March 15.  
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AN action of damages against the tacksman of a toll-bar and his servant, and the farmer of the post-horse duty and his servant, for stopping one of the mourning coaches attending the funeral of the pursuer's brother.

Damages to the relation of a person deceased, against the farmer of the Post-horse Duty, for having wrongfully stopped a coach conveying company to a funeral.

DEFENCES for the farmer of the post-horse

\* The case was again tried on the 28th and 29th December 1830, when the following verdict was returned :—" Find on " the 1st issue, that, on the 4th of August 1826, the pursuer offered to purchase from the defender the estate of Belladrum " at L. 80,000,—that, on the 8th of August, this offer was accepted, and, on 17th August, the contract of sale was signed " —on the 2d issue find for the pursuer.

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duty.—There was here no damage which a court can take cognizance of. The defender is not liable for the person under him, who does not hold his commission from him, and was acting beyond it.—For the toll-keeper.—He was entitled to stop the carriage till the duty was paid, or till a ticket was produced.

#### ISSUES.

“ It being admitted that, on the 30th day of  
“ May 1829, the pursuer hired a coach for the  
“ purpose of conveying certain persons to Lib-  
“ berton Churchyard,—

“ Whether, at or near Mayfield Toll-bar, on  
“ the road from Edinburgh to Libberton afore-  
“ said, the defenders, or any of them, by them-  
“ selves, or others acting under their authority,  
“ wrongfully stopped the said Coach, and pre-  
“ vented the same from proceeding to the said  
“ Churchyard, to the loss, damage, and injury  
“ of the pursuer ?”

*Cockburn* opened for the pursuers and said, The duty and toll were both paid, and the coach, notwithstanding, was stopped, and the persons treated with insolence. The only question is the amount of damage.

*Jeffrey, D. F.* opened for the defender *Mill*.  
—There are a number of good defences for the

farmer of the post-horse duty, who knew nothing of what had taken place till long after. The action is incompetent, as the pursuer was not stopped. This arose from a mistake, and from one of the tickets being altered from two to four, and there was no signature to the alteration. It was the duty of the toll-keeper to stop the carriage; the other is an inferior officer, but not the servant of Mill; and if he had been the servant, and did stop the carriage, this was beyond his employment.

*M<sup>r</sup> Neill*, for the toll-keeper.—I adopt much of what has been stated; there is nothing here as to checking the insolence of toll-keepers; the whole arises from the irregularity of the tickets, as those offered were not proper.

LORD CHIEF COMMISSIONER. — The case would be different if it were clear that the ticket was written by the person who let the coach. The tickets are not according to the act, as a blank should have been left for the number of horses, instead of inserting the word two.—(To the jury.)

I am anxious to disentangle this case from the difficulties which surround it. I may think it would have been better if this case had been otherwise settled; but the Court must be open, and justice must be done. In the situation in


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which the pursuer was placed, his feelings were excited, and it is clearly a case where *solatium* may be claimed. It is a mistake to say that this was the coach of those who were in it—they were as much the guests of the pursuer as if they had been in his house. The coaches were his for the day, and he is entitled to bring the action for the disappointment.

The difficulty in the case arises from defect of evidence, as it is not proved by whom the alteration was made on the ticket, and whether the toll-gatherer was bound to notice it. If you think he was, then the farmer of the horse-duty stood in a situation to be liable in damages. By the act, the person using the ticket is bound to fill in the number of horses; and from the state in which these tickets were issued to him, the only way of doing so is by striking out “*two*,” and inserting the number. It would have been better if the *word* instead of the figure four, had been inserted, and it is a question for you whether the alteration which was made was sufficient to attract attention.

As to the toll-gatherer, the question is, whether the tickets were altered in a way to attract his notice?

The tickets are most material. If they were delivered out in a state requiring alteration, then I hold Mill, the farmer of the post-horse



duty, liable,—if the alteration was so slightly made as not to attract attention, I think the verdict ought to be in favour of the toll-gatherer and his servant ; but this is matter for you on inspection of the ticket.

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Verdict—“ Find for the defenders, Stirling  
“ and Pearson, and for the pursuer against the  
“ defender, Mill, and assess the damages at  
“ L.5 Sterling.”

*Cockburn*, for the Pursuer.

*Jeffrey, D. F., Rutherford*, and *M'Neill*, for the Defenders.

(Agents, *Thomas Baillie*, s. s. c. and *Hugh Watson*, w. s.)

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PRESENT,

THE LORD CHIEF COMMISSIONER.

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DICKSON & SONS v. DICKSON & COMPANY.

1830.  
March 15.

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AN action of damages for executing orders intended for the pursuers, and for violating an agreement not to open letters, the address of which was doubtful.

Finding for the defenders in an action against one company of merchants for executing an order intended for another.

DEFENCE.—The agreement was with a former company, which is dissolved. The pursuer, as an individual, cannot pursue for any

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thing done against that company. The defenders did not commit the alleged acts against the pursuer.

ISSUE.

“ It being admitted, that the pursuer is a  
“ nursery and seedsman, carrying on business  
“ in Edinburgh, under the company firm of  
“ James Dickson and Sons, and that the de-  
“ fenders are also nursery and seedsmen, car-  
“ rying on business in Edinburgh, under the  
“ firm of Dicksons and Company.

“ Whether, on or about the 27th day of  
“ February 1829, an order was transmitted by  
“ Mrs Douglas of Old Melrose, intended for  
“ the pursuer, and whether the defenders,  
“ knowing that the said order was intended for  
“ the pursuer, did wrongfully execute the same,  
“ to the loss, injury, and damage of the pur-  
“ suer ?

“ Whether, during the said month, in the  
“ said year, an order was transmitted by Wil-  
“ liam Wilkie, Esquire, of Preston, intended  
“ for the pursuer, and whether the defenders,  
“ knowing that the said order was intended  
“ for the pursuer, did wrongfully execute the  
“ same, to the loss, injury, and damage of the  
“ pursuer ?

*Rutherford* opened for the pursuer.—The similarity of the two firms affords the means of fraudulent dealing; and so early as 1814, the pursuer suspected that orders intended for him had been executed by the defenders.

*Jeffrey, D. F.* for the defenders.—The issue is to try two transactions in the course of last year; and is it tolerable that they are to open and prove what took place in 1815, with a different company, which did or did not get redress for the alleged injury?

*Cockburn.*—This is not only competent, but vital to the case. The Court know nothing of the case, except from the record, and the few sentences which have been stated. We do this advisedly, and must get credit in the first instance for its admissibility.

*Jeffrey, D. F.*—A party is bound to render it plausible that he will be allowed to prove what he states, and not to rest on the responsibility of his counsel. Is there no case in which interference is competent to prevent the jury from being prejudiced, suppose they go to the records of the Commissary Court?

**LORD CHIEF COMMISSIONER.**—If any thing so extravagant were attempted, as to introduce into a question on a transaction in trade, matter


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An opening  
counsel allowed  
to state facts  
which were ob-  
jected to as ir-  
relevant and  
tending to pre-  
judice the jury.

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so irrelevant as has been supposed, the Court must interfere ; but at the same time they must trust a great deal to the discretion of counsel. On the present occasion, I would recommend to Mr Rutherford not to state more than is absolutely necessary to make the case intelligible, and not to prejudice the jury. Were I now to reject this, it would be deciding on the admissibility of evidence, without knowing the case or the nature of the evidence. In all cases of questionable evidence, it is necessary for the Court to be most cautious, especially where character is involved, as that which is not evidence on one part of the case may be evidence on another. All the Court can say at present is, that it ought to be so stated as not to produce prejudice.

*Rutherford.*—The statement we make under this permission is, that there was a former action in which the defenders were subjected in L. 150 damages. That a second action was brought, but withdrawn, on an agreement to pay the same sum, and to bind themselves under a penalty of L. 500, not to open letters, the address of which was doubtful. In 1821, they acknowledge this forfeited, and agree to double the penalty. This was entered into with the

former Company of Dicksons Brothers, but was acted on with the pursuer.

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When the letter in 1821 was given in evidence,

*Skene*, for the defender.—We wish explanation as to the object of giving this in, and how it bears on this issue.

*Cockburn*.—This is a letter from every individual of the one company to every individual of the other ; and we produce it to show that the defenders could not have acted from accident or mistake ; and to increase the damages, by showing that this is a repetition of the act.

*Skene*.—It is impossible to admit this in a case with an individual, which is a transaction with a company. That company was dissolved in 1815, and, even if the parties were the same, it could not bear on this question.

In an action by an individual against a company for executing orders intended for the individual, incompetent to give in evidence a letter written by the defenders ten years before, acknowledging a similar offence, against a company of which the individual was then a partner.

LORD CHIEF COMMISSIONER.—So far as my experience goes, this is a tender of evidence such as I have not seen. It is tendered for two objects. To show that the defenders acted wrongfully, and to enable the jury to judge of the damages. In both views, the objection that it is *res inter alios* applies ; but I do not rest much on this, because if on other grounds

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v.  
DICKSON & Co.

it were admissible, perhaps the benefit of an agreement with the company should be communicated to the individual.

But the main question is, whether it supports the gist of the case, which is, that it was done knowingly and wrongfully ; and how can it be said that a letter ten years before can aid the proof of their knowledge ? It appears to me, that it would only mislead the jury, and tend to confusion, by laying before them matter which they ought not to consider.

A verdict and letter, on which damages were paid to the company, also rejected.


On the same grounds the verdict in the former case, and the letter on which L. 150 were paid, were rejected.

*Jeffrey* opened for the defenders.—The blame here lies with the pursuer, who assumed a company firm, which gave rise to the mistake. The question here is, fraud or not ? and the pursuer accuses this great company of a pitiful fraud to obtain the profit of an order to the extent of four or five pounds. The orders were brought to them, and if they had intentionally executed the order, they must have known that detection was unavoidable.

LORD CHIEF COMMISSIONER.—It is now for you to find a verdict, and I shall at once pro-

ceed to the issues, which in this, as in all cases of the sort, show the ground on which the action will lie, and without which it is not maintainable. The first question is, whether this was done knowingly and wilfully? The questions, whether it was wrongfully done, or has a tendency to injure do not arise till the other is established. It is a principle of common sense as applicable to a case of deceit, that the person must know what he is doing before it can be said to be deceitful or fraudulent. As the Court and jury must proceed on legal evidence, your minds ought not to be affected by the evidence which was tendered, but rejected.

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v.  
DICKSON & Co.



There is a curious contrariety of evidence as to the address of the order mentioned in the first issue, as there is no doubt Mrs Douglas intended to write, 32, Hanover Street; but the porter, who was going near Hanover Street, gave it back to the carrier to deliver at Waterloo Place, on his way to Leith; and you will consider whether this transaction does not establish that, by some mistake, the wrong address was on the parcel; but if you prefer the other evidence, you will then have to consider whether there was such deliberate knowledge on the part of the defenders as amounts to fraud. In deciding this, you will attend to the various facts

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v.  
DICKSON & SON.

proved, as bearing on the improbability of a fraudulent execution of the order.

The evidence on the other issue is shorter, but the principle is the same.

If you think such knowledge is made out as amounts to deceit or fraud, you will find for the pursuer, and assess the damages,—but if not, then for the defenders.

Verdict—“ For the defenders.”

*Cockburn, Rutherford, and Aytoun, for the Pursuer.*

*Jeffrey, D. F., Skene, and G. G. Bell, for the defenders.*

(Agents, *Aytoun and Greig, w. s.* and *Walter Dickson, w s.*)

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PRESENT,

LORD CHIEF COMMISSIONER.

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1830.  
March 15.

DICKSON & Co. v. JAMES DICKSON & SON.

Finding for the defenders in an action against one company of merchants for executing an order intended for another.

THIS was an action by the defenders in the former case against the pursuer. The issues were two in number, and in substance the same as in the former case.

*Skene* opened for the pursuers, and stated the facts, and that the defender, knowing the



order was not intended for him, proceeded to execute it, and had recourse to a clumsy artifice to screen himself.

DICKSON & Co.  
v.  
DICKSON & SON.

*Cockburn* opened for the defender.—As no attempt has been made to prove the first issue, it must be found for the defender.

A case of this sort must be proved as strictly as if it were a trial for a crime. The execution of the order is not well proved, but the important feature of the case is, that this order was sent to a gentleman, who, believing it to be intended for the pursuer, brought it to his shop. The clumsy artifice referred to, as inferring fraud, was, that the pursuer, when a question was raised about it, went to this gentleman, and got him to indorse the fact.

LORD CHIEF COMMISSIONER.—The first issue is abandoned. On the second, you must be satisfied that the pursuers have proved the defenders' knowledge before you can find for them. The order was intended for the pursuers, but Mr Nisbet, to whom it was transmitted, took it to the defender, and he has been called and proved the facts.

The whole case depends on your opinion on the note put on the order by Mr Nisbet, and the reference to the order of a former year ;

SASSEN  
v.  
CAMPBELL.

but this might escape the attention of a person who intended fairly. It is said the certificate is written for the purpose of covering the fraud ; but the question is, whether the defender may not have acted as fairly as Mr Nisbet, of whom there cannot be the slightest suspicion ?

You are to say whether it is made out distinctly, that Dickson of Hanover Street executed the order, knowing it to be for Dickson of Waterloo Place.

Verdict—" For the defenders."

*Jeffrey, D. F., Skene, and G. G. Bell, for the Pursuers.*

*Cockburn, Rutherford, and Aytoun, for the Defenders.*

(Agents, *Walter Dickson, w. s. and Aytoun and Greig, w. s.*)

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PRESENT,

LORDS CHIEF COMMISSIONERS AND CRINGLETIE.

1830.  
March 17.

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SASSEN v. CAMPBELL.

Finding for the defender in an action for remuneration, and for expence incurred in executing business for the defender.

AN action to recover travelling expenses, and certain sums expended for the defender, and L. 1000 for the risk in carrying on his business and in coming from France to this country during the late war.

DEFENCE.—The expenses were paid by the defender. In the relative situation of the parties, the pursuer cannot claim as mandatory, and her claims are more than compensated.

SASSEN  
v.  
CAMPBELL.



## ISSUES.

“ It being admitted, that the defender,  
“ while residing at Paris, granted to the pur-  
“ suer a power of attorney in terms of a letter,  
“ dated 23d June 1808 :

“ Whether, in the execution of the powers  
“ granted by the said letter, the pursuer came  
“ to Britain, and transacted certain business  
“ for the defender during the years 1808 and  
“ 1809 ; and

“ Whether the pursuer expended L. 1240  
“ Sterling, or any part thereof, according to  
“ the schedule hereto annexed, in the execu-  
“ tion of the said business ; and whether the  
“ defender is indebted and resting owing to  
“ the pursuer in the said sum of L. 1240, or  
“ any part thereof, for expense in the execu-  
“ tion of the powers granted by the said letter ;  
“ and in the sum of L. 1000, or any part  
“ thereof, as remuneration for her services in  
“ the execution of the said powers ?

*Robertson* opened for the pursuer, and said,

SASSEN  
v.  
CAMPBELL.



The pursuer believed herself the wife of the defender at the time the business was done ; but he having abandoned her, and she, though successful in the Court of Session, having failed in the House of Lords in establishing her marriage, it became necessary for her in this way to seek redress. If he says the sums for travelling were paid out of his funds, he must prove it.

When the evidence was about to be closed, his Lordship asked if they gave no evidence of the sums stated in the schedule, or of the solatium ? None being produced, he said, In this case the pursuer has made out nothing. It has been proved that she came here as the wife of the defender ; but that is not the question ; and no proof being given of any of the items, I advise you to find for the defender, as in absence of proof it must be presumed the funds she expended were supplied by the defender.

Verdict—For the defender.

*Jeffrey, D. F., Robertson, and Paton, for the Pursuer.*  
*Hope, Sol.-Gen. and Cuninghame, for the Defender.*  
(Agent, *James Bennet, w. s.*)

BLINCOW'S TR.

v.

ALLAN &amp; CO.

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 PRESENT,

LORDS CHIEF COMMISSIONER AND MACKENZIE.

 1830.  
 March 18.
 

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## BLINCOW'S TRUSTEE v. ALLAN &amp; COMPANY.

THIS was an action of reduction of a bond, and the indorsation to certain bills, and of repetition of the sums contained in them, on the ground that they were granted on the eve of bankruptcy as a preference to the defenders over the other creditors.

Finding that funds were not paid to bankers in the ordinary course of trade, but to give them an undue preference.

DEFENCE.—One defence was, that the bills were discounted in the ordinary course of trade.

## ISSUE.

“ It being admitted that the estate of William Blincow and Company, silk-warehousemen in Edinburgh, was sequestrated on the 30th day of May 1827, and that the pursuer is trustee on the said estate, and that the defenders were the bankers with whom the said William Blincow and Company transacted their business :—

“ It being also admitted that, on the 28th

BLINCOW'S TR.  
v.  
ALLAN & Co.



“ day of September 1825, the said William  
“ Blincow as principal, and his brothers, John  
“ and Valentine Blincow, as cautioners, granted  
“ a bond in the English form for the penal  
“ sum of L. 5000, the condition of the said  
“ bond being for the payment of L. 2500 by  
“ three equal instalments, and that the third  
“ instalment of the said bond, amounting to  
“ L. 833, 6s. 8d. became due on the 14th day  
“ of October 1827 :—

“ It being also admitted that, on the 4th  
“ day of May 1827, being within sixty days of  
“ the said sequestration, a cheque or order,  
“ dated 12th May 1827, by William Blincow  
“ and Company, for the sum of L. 838, 13s. 4d.  
“ was presented to the defenders, and the pro-  
“ ceeds applied in payment of the third instal-  
“ ment of the said bond :—

“ Whether, in terms of the interlocutor of  
“ the First Division of the Court of Session,  
“ dated 12th June 1829, the funds against  
“ which the said cheque was presented, were  
“ not paid to the defenders in the fair and or-  
“ dinary course of trade, but were deposited  
“ with the view, and for the purpose of afford-  
“ ing to the defenders an undue preference  
“ over the other creditors of the said William  
“ Blincow and Company ?”

*Skene* opened for the pursuer, and said, The bills were indorsed to the defenders by the bankrupt, within sixty days of his bankruptcy, in payment of the third instalment of a bond, several months before that instalment was due, and thus gave an undue preference to the defenders over the other creditors. It is not necessary to prove that the fraud was known to the defenders, provided it was the intention of the bankrupt; and the circumstances show that the bills could not have been discounted with the hope of carrying on his business, or with any fair view.

BLINCOW'S TR.

v.  
ALLAN & Co.

*Jeffrey*, opened for the defenders.—We do not differ as to the facts or the intention of the party, but as to the inference to be drawn from it. The general rule is, that preferences to creditors within sixty days of bankruptcy are void; but there are many exceptions to this rule. Such as the delivery of bills, cash, or goods, in the ordinary course of trade. The defenders were not parties to the preference, and the pursuer must prove that it was *not* in the ordinary course of trade. If the funds were put in properly, the defenders might at common law retain them in security. His intending illegally to draw it out and pay it as a preference to the defenders, cannot affect their

BLINCOW'S TR.

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ALLAN & Co.

right to retain. The intention was not to favour the defenders, but his brother, who was an obligant in the bond.

**LORD CHIEF COMMISSIONER.**—When attention is paid to the manner in which this case comes before us, it will be found to be a question of fact to be made out in evidence. There is no doubt that a bankrupt may give one party a preference when the intention was to favour another. This person seems to have wished to favour his brother, but in his attempt to do so, he may, by the lien a banker has on funds in his hands, have given the defenders a preference while honourably carrying on their business. This is a perfectly honest case on the part of the defenders, and it is necessary to attend to the manner in which it comes here.

The question for you is, whether the sum was paid in with the view and purpose of meeting the instalment of the bond, and of giving an undue preference? One strong circumstance bearing on this question is, that the bankrupt allowed diligence to be done against him for L. 140, without drawing out L. 132, which he had in the bank. If this sum was necessary to make up the instalment of the bond, is it probable or not, that it was left there for the pur-



pose of making up the sum?—Were the payments made in the ordinary course of business, when the person went to the sanctuary in the course of a few days? or were they pressed forward to meet the claim on his brother? The cheque drawing out the sum is dated the same day the money was deposited, and though the cheque is reduced, it is not taken away as an adminicle of evidence.

BLINCOW'S TR.

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If you are of opinion that the sums were paid in to meet the cheque, then you will find for the pursuer, but if not, for the defenders; and in either case, you will re-echo the issue which is taken from the interlocutor of the Court of Session.

Verdict— “ Find that the funds against  
 “ which the cheque was presented were not paid  
 “ to the defenders in the fair and ordinary  
 “ course of trade, but were deposited with the  
 “ view, and for the purpose, of affording to the  
 “ defenders an undue preference over the other  
 “ creditors of William Blincow and Company.”

*Skene and Wilson, for the Pursuer.*

*Jeffrey, D. F., Cockburn, and Sandford, for the Defenders.*

(Agents, *John Patison, Jun. w. s.* and *Allan and Bruce, w. s.*)

SCOTT, &c.  
v.  
MILLER & KERR

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PRESENT,

LORDS CHIEF COMMISSIONER AND CRINGLETIE.

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1830.  
March 22.

SCOTT & GIFFORD, v MILLER & KERR.

Insurance brokers found liable to an admitted owner of half a vessel for not having insured it in terms of the letter ordering the insurance. A registered owner found not the true owner of the other half of the vessel.

THIS was an action to recover from the defenders, insurance brokers, the sum of L. 1000, on the ground that they had failed to insure a vessel, in terms of a letter ordering the insurance.

DEFENCE.—A foreigner was owner of half the vessel, and not Gifford, the nominal pursuer. The pursuers did not object to the policy furnished.

#### ISSUES.

“ It being admitted that the pursuer, Scott,  
 “ was, on the 26th day of June 1821, proprie-  
 “ tor of one-half of the vessel called the Earl  
 “ of Dalhousie, and that, on the 4th day of  
 “ July 1821, the said vessel sailed from the  
 “ Clyde, and touched at Fort-William, in the  
 “ north of Scotland, and, on her outward  
 “ bound voyage, was totally lost on the 6th

“ day of September 1821, on the side of the  
“ Island of Anticosti, in the Gulf of St Lau-  
“ rence :

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v.  
MILLER & KERR

“ It being also admitted, that, by a policy  
“ of Insurance, dated the 3d day of July 1821,  
“ the Sea Insurance Company of Scotland in-  
“ sured the said vessel on a voyage from Clyde  
“ to Quebec, and ports of discharge and load-  
“ ing in British North America, while there,  
“ and back to Dundalk and Greenock, with  
“ leave to call at Tobermory for passengers on  
“ the voyage out :

“ 1. Whether, on the 20th day of June  
“ 1821, the pursuer, John Gifford, was owner  
“ of the one-half of the said vessel ?

“ 2. Whether the defenders, or any of  
“ them, promised and agreed to insure, or to  
“ get L. 1000 insured on the said vessel, on a  
“ voyage, at and from Clyde to Quebec, (with  
“ leave to call at a port in the Highlands, to  
“ take in passengers,) while there, and thence  
“ to Dundalk, and from Dundalk to Greenock,  
“ in terms of a letter from Mr Joseph Manti-  
“ cha, dated 16th June 1821, and whether  
“ the defenders failed to perform the said pro-  
“ mise and agreement, to the loss, injury, and  
“ damage of the pursuers, or either of them ?  
“ Or,

SCOTT, &c.  
v.  
MILLER & KERR

3. "Whether the pursuers accepted of the said policy, dated 3d July 1821, as implement of the promise and agreement foresaid, on the part of the defenders?"

*Russell* opened the case for the pursuers, and said the action was founded on neglect of duty, and the defenders having failed to get an effectual insurance, must be held insurers. Instead of getting liberty for the vessel to call at a port in the Highlands, they had limited it to a particular place. They say we deviated on the coast of America from the voyage pointed out in the order for insurance; but we did not deviate from the voyage in the policy which they tendered to us.

When the insurance was found ineffectual, the defenders plead, and take an issue to prove that the owner was a foreigner, and that we accepted of the policy; but they must say that we did so knowing the defect in it.


Before a witness is asked whether he sold for another, his power to sell must be proved.

When a witness was asked if he sold the vessel, an objection was taken, that the power to sell must be proved before the sale.

LORD CHIEF COMMISSIONER.—If this person were the proprietor, you might ask whether he sold; but this was a sale by the witness, not for

himself but another ; and you must first prove that he had power to sell.

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v.  
MILLER & KERR



*Skene*.—We do not dispute the general law, but they have admitted the power to sell in one of the parties.

*Jeffrey, D. F.*—The terms of the admission are, that Scott is owner, and it cannot be extended beyond its terms.

LORD CHIEF COMMISSIONER.—Was this in the view of the party at the time the admission was made ? If it rested on the admission, I should say the objection was good ; but something may also rest on the power of attorney being attested in America. I never could come to the conclusion, that an admission, that one party was owner, could be extended to prove the ownership of another party. But it has occurred on the Bench, that the manner in which this power is made up, and in which it comes here, may render this a probative document.

*Jeffrey, D. F.*—This is not probative either by the law of England or America. The law of England requires the attestation of a living witness. I admit that, if it would be received

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 v.  
 MILLER & KERR  
 1 Phillipp's, 411.

in the Court of Session, it must be so here, but I deny that a person taking the character of notary is sufficient. Tait, 104—26 Geo. III. c. 60, requires proof of the handwriting.

*Cockburn.*—The law of Scotland admits it if regularly executed.

LORD CHIEF COMMISSIONER.—The question on the law of Scotland may be thus stated. Whether that law admits a document in evidence which bears to be a notarial instrument? I cannot give evidence of the law of England, which is the only way in which it can go to the jury; but there is nothing in the passage in Phillipp's to correct my memory on this subject. Every instrument executed in England requires a witness to prove it, but if a Scotch deed is produced, then a witness is not necessary to prove it good; but it is sufficient to prove that it is probative by the law of Scotland. In England it is necessary to call the subscribing witness to prove a bond, or, if he is dead, to call one to prove his writing; and there is no difference in this respect between a bond and power of attorney, if it was naked and stood alone; but in a foreign country, it is attested by a public officer to authenticate it, and to prevent the hardship of bringing a witness from

India or Nova Scotia. If the document is attested by a person who has authority, faith is given to the document by the law of England, and the *onus* is thrown on the other party. I therefore think we ought to receive this, subject to the observations of the Dean of Faculty.

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The act of Parliament referred to was necessary, as deeds are found without attestation.

We admit this, and credit is to be given to it, unless it is proved false. It is regular; the seal is admitted; and there is no attempt to question this being the act of the notary.

The question was again raised, whether the deviation in America freed the defenders, when the Dean stated that it was an essential part of their case, because the order to insure was to Quebec, and if a policy had been granted in these terms, the pursuers could not have recovered.

LORD CHIEF COMMISSIONER.—Your plea is, that they had taken themselves out of the policy if it had been given. They object, that there was not a policy in terms of the letter, and you say they deviated on the coast of America from the voyage stated in the letter.

The case of the pursuer rests on there being  
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v.  
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no policy to cover the vessel touching at Fort William. The defender is to make out that the deviation on the coast of America would have freed the insurer if a policy had been granted.

Perie v. Anderson, 4 Taunt. 652.

Jeffrey, D. F., opened for the defenders.—The question is, on whom this loss is to fall, but there is a preliminary question, whether the pursuer has a right to half the property, or whether he was not guilty of a sort of fraud by lending his name to a foreigner? In England, the register was held not *prima facie* evidence, and the case decided there was not so strong as the present, where the real party could not be owner.

The broker can only be liable as the underwriter would have been if a policy had been granted in the terms ordered. I admit the error, and that, if the vessel had sailed on the voyage mentioned in the letter, the pursuer might have recovered; but they cannot combine the policy they ordered with the one they got, and say that out of this combination the loss is covered.

Circumstances in which parol evidence was admitted to prove the contents of a writing.

An objection was taken to the production of the deposition of a haver to prove



that a letter could not be recovered ; and it was proposed to prove the contents by a witness.

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v.  
MILLER & KERR

LORD CHIEF COMMISSIONER.—The evidence proves that a letter was written at the time, and that it is not to be found. When a principal writing is not to be found, a copy is the next best evidence, and then parol testimony. In this case I think sufficient has been proved to entitle the party to parol evidence of its contents.

The pursuers afterwards admitted that the vessel deviated, if they were limited to a voyage from the Highlands to Quebec without liberty to touch at port or ports.

*Cockburn*, in reply.—The defenders acted, and were paid, as brokers, and neglected the instructions given. The Court of Session held that the name of a person being in the register did not make him owner ; but it is a circumstance along with the other evidence for your consideration, and you have had proof of his acting as owner, and of his granting bond and swearing to the fact. The defenders say he held it in trust ; but this is inconsistent with the policy of the law, which holds the person in the register liable as owner.

On the second issue, the defenders have no

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MILLER & KERR



right to talk of a deviation, having failed to send a copy of the policy.

LORD CHIEF COMMISSIONER.—The first subject of inquiry is, Whether Gifford was a true owner, or held the share in trust? but even if he was not owner, it is necessary to consider the second question with great attention. On the first point, nothing better can be stated than the interlocutor of the Court of Session, which finds that the register *per se* is not sufficient. This does not go quite so far as the English Courts have done, as it admits the register to be an ingredient of proof along with other evidence, and, therefore, the case has been sent here. You will therefore consider whether the pursuer, who is bound to make out the fact, has brought other evidence, and whether that evidence has been met by the defender. You have it proved that the vendition was made out without inquiry as to the ownership—you have also proof of certain acts by the pursuer, but whether as owner or clerk to another, does not clearly appear. In opposition to this, you have the testimony of a witness for the defender, proving the contents of a paper, in which the pursuer acknowledged that he acted for another; and if the memory

of this witness is correct, the evidence for the pursuer flies off. There were also other facts as to payment of money, which are not easily explained if the pursuer was the owner.

SCOTT, &c.  
v.  
MILLER & KERR



[It was here suggested that the registry acts do not admit of a ship being held in trust, but make the trustee owner.]

If this is the law, I cannot conceive how this case comes here, as the Court of Session had that act before them, and I am now bound to send it to the jury on the facts proved. If I am wrong, the party may move for a new trial, and tender a bill of exceptions. It is impossible, in the face of the terms of the interlocutor, for me to direct you (the jury) to find that the pursuer was trustee, leaving the question for argument in the Court of Session; but I am of opinion that you must find in the affirmative or negative of the issues.

The pursuer brings his action on a disobedience of the instructions given, and says he is entitled to recover, though he deviated by going to Fort William, as he did not deviate in America from the terms of the policy; the defender, on the other hand, says you abandoned this policy, and it is now waste paper, and you cannot rest on it where it is more favourable to you than your instructions. We

SCOTT, &c  
v.  
MILLER & KERR



have only to consider this on the question, Whether the defenders agreed, and whether they failed, and that to the loss of the pursuer?

A broker is an interposed agent, and is to act according to instructions; and there is no doubt that the vessel having touched at a port in the Highlands, if she had sailed direct for Quebec and been lost, the pursuer would have recovered. The broker must have been the insurer; but here the single question is, Whether the non-recovery has been occasioned by the non-performance of the agreement? The broker will be relieved if the underwriter would have been relieved, and this is to be decided on the order, not on the policy. The deviation on the coast of America is admitted, and, as that deviation would have relieved the underwriter if a policy had been granted in terms of the order, the same law must be applied to the broker. On the second issue, the only verdict you can give consistent with the law, as it has been decided in this case in the Court of Session, is for the defenders. On the first, you will consider the evidence, and on the last, as it is given up, you will find for the pursuers.

Verdict—" Find for the defenders on the  
" first issue, and find for the pursuer on the

“ second and third issues, and that the sum  
 “ due to the pursuer, Scott, on the policy, is  
 “ L. 500.”

SIR W. FORBES  
 & Co.  
 v.  
 EDIN. LIFE  
 ASSUR. Co.

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PRESENT,

LORDS CHIEF COMMISSIONER AND CRINGLETIE.

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SIR WILLIAM FORBES & COMPANY v. EDIN-  
 BURG LIFE ASSURANCE COMPANY.

1830.  
 March 23.

AN action, by assignees to a policy, for pay-  
 ment of the sum insured on a life.

Finding that in-  
 surers were in-  
 debted in the  
 sum insured on  
 a life.

DEFENCE.—Misrepresentation and non-  
 statement of material facts.

ISSUE.

“ It being admitted, that, on the 26th day  
 “ of September 1826, the defenders granted  
 “ the policy of insurance, No. 6 of process,  
 “ whereby, in consideration of a certain pre-  
 “ mium, the defenders agreed to pay to Wil-  
 “ liam Inglis, W. S. the sum of L. 3000 Ster-  
 “ ling, on the death of John Thomas Earl of  
 “ Mar, and that the right to the said policy is  
 “ now in the pursuers :

“ It being also admitted, that on the 20th  
 “ day of September 1828, the said Earl died :

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“ Whether the defenders are indebted and  
“ resting owing to the pursuers in the said  
“ sum of L. 3000, contained in the said po-  
“ licy?”

*Anderson* opened for the pursuers, and stated the facts, and that the pursuers were not parties to the original transaction ; that the sum was refused on the ground that there had not been a full disclosure of the state of Lord Mar's health, and a concealment of his habit of taking opium. We deny his taking opium to the extent stated, and maintain that he was in good health, and had no illness tending to shorten life. The defenders put no question to Lord Mar as to his habits ; and having taken the return of their own medical officer, who did not answer the question as to habits, they are not now entitled to object. The state of Lord Mar's affairs was the cause of the depression of his spirits previous to his death.

In a question on one policy of insurance a party allowed to produce another policy by the same office on the same life.

An objection was taken to the production of a policy executed on the life of Lord Mar in 1823.

LORD CHIEF COMMISSIONER.—This is not worth debating about ; it is merely *prima facie* evidence of what the office thought at the time ;

and the only question is, whether they are called on to answer it? I shall allow the pursuers to produce it at present; but their reading it must depend on the evidence to be produced.

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An objection was also taken to Mr Gibson-Craig, stating a transaction as to a loan of L. 50,000.

*Hope, Sol.-Gen.*—You may ask his opinion, or whether he advised the office for which he acted to take the risk.

*Cockburn.*—We are entitled to prove that he acted on that opinion, and that he was personally concerned in the transaction.

LORD CHIEF COMMISSIONER.—I think you may by his evidence lay the foundation for proving the transaction by legal evidence.

*Hope, Sol.-Gen.* opened for the defenders. —The case is most material in reference to the principles which it involves. Taking two ounces of laudanum a-day was a material fact which *Lord Mar* was bound to disclose, and not having done so, the office is free. The insurance was for the security of the pursuers, and they are liable for the acts of *Lord Mar* and Mr Inglis, his agent. The office is not

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bound to do any thing, unless, on the face of the declaration, the risk appears different from the common one. The disease of which he died, jaundice, is a natural result of this habit; but we rest on this, that it was a fact material for the office to know. If the fact had been known, no office would have taken this risk without a special report.

I submit to the Court, as the result of the cases on this subject,

Maynard v.  
Rhodes, 5 D. and  
Ry. 266.

Morrison v.  
Muspratt,  
4. Bing, 60.

Everett v. Des-  
borough,  
5 Bing. 503.


1. That the party for whose benefit an insurance is made must suffer, if the representation is not correct. 2. If he suppresses any circumstance which it is material for the office to know. 3. The jury, and not the party, are the judges of whether the fact is material. 4. The failure to state what medical men think material was sustained in a recent case. 5. The party whose life is insured is, to the extent of the statement made, the agent of the party making the insurance.

*Cockburn*, in reply for the pursuers.—The question in the issue depends on whether this is a good policy. As the defenders put their names to it, and took the premium, I have a legal and moral right to recover the sum insured, unless they prove an objection to the policy. Their objection is not fraud, or that



this was not an insurable life ; but that a fact ought to have been disclosed, to enable them to calculate the risk. I admit that the concealment of a material fact vacates the policy ; and you, the jury, are the absolute judges whether it is material, but must look with a nice eye to it.

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It is said the office are not bound to do any thing ; they ought to have been vigilant, and not to have granted the policy without an answer to the question as to habits. The question turns on the habits of Lord Mar,—the presumption is in our favour, and they have not proved that he took opium to excess, and that it produced on him an effect which it was material for the office to know.

The question is the effect produced on the individual and his chance of life. It is impossible that his mind and memory could have been in the state which has been proved, if he took opium to excess ; and it is proved not only by opinion but facts, that he had no appearance of taking opium.

LORD CHIEF COMMISSIONER.—The issue contains the question to be tried, and giving an affirmation or negative, by finding for the pursuer or defender, will be sufficient. But whether the defenders are or are not indebted,

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depends on the concealment charged against Lord Mar, and those making the insurance. The question is not whether his death was caused by the use of opium, but whether there was a concealment of a material fact ?

Insurance is a contract of indemnity, and is of a most sacred nature, in which the material facts must be disclosed, whether the subject is a ship, a house, or a man. In all of them there is a sum paid to get indemnification for the loss of the article ; and, as the premium is in proportion to the risk, concealment voids the policy ; but the party objecting must make out that the fact was material. In the present instance you had documentary evidence laid before you, and also proof of the acts of the party ; and you have to consider whether the fact ought to have been disclosed.

The pursuers come with perfect fairness, and the case does not depend on their knowledge of the fact ; but the defenders are not bound to pay, unless law would have bound them to pay to the original party.


My general observations in this case are more matters of common sense than law, as it is purely a question of fact ; and you will have to consider the documents, and contrast them with the other part of the case. The questions put

in the schedule of the office are, What are his habits? Temperate? Or free? These are united, and a general answer given by Mr Weir. Dr Wood only answers the two last, and his answer is favourable; but he does not answer the general question. I do not rest on the circumstance of Dr Wood being the officer of the defenders; but it is a very material circumstance that they refer to a medical man, and then make the insurance, without an answer to a question which is material in making the insurance and fixing the premium. By this conduct must they, or must they not, be held to have abandoned this, as they made the insurance without an answer? If they took the risk without this answer, must they not be held to have passed from this as to habits?

Lord Mar seems to have kept this habit as secret as possible; and if his ordinary medical attendant had been called, he could not have given farther information. This raises the question whether Lord Mar was under a moral obligation to disclose his habit, or are the office to be held as abandoning it. It is undoubted that there may be facts which in honour and honesty an individual is bound to disclose, otherwise the policy will be void; but the question returns, whether he is under this obligation, if the in-

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surers act so as to show that they do not consider it material.

The evidence in this case had a twofold object,—1st, To show that the habit existed ; 2d, That it was to such an extent as to be important, and that he was bound to disclose it.

In the simple case there would have been merely the evidence of the habit, but the conduct of the defenders rendered farther evidence necessary. During his residence in England, and after his return here, you have it proved that he got opium in a mysterious way ; and, though his housekeeper speaks of his using it, yet Lord Mar is the only person who knew the extent to which he took it. You must consider the nature of the habit, and the effect of it ; and, though his servants spoke of his taking opium and brandy, yet the spirits were a mere adjunct to the other. The second point is, whether he, *Lord Mar*, was bound to disclose it to the office, to enable them to reject the insurance or raise the premium ? Some of the witnesses described the appearances produced by the use of opium, and that it might produce disease ; but others speak of Lord Mar as neither debilitated in body or mind, and that his habits at the time this insurance was made were those of other gentlemen. At

one time he lived secluded ; and when he became acquainted with the disordered state of his affairs, he was knocked down by the information, and never rallied. You are to consider whether the use of the drug had not a considerable effect, so as to require to be disclosed—whether the state of his affairs was the cause of the depression—or whether it was both combined.


Two witnesses stated that he had no habit which apparently produced any effect, either on his body or mind, which bears on the question, whether it was so material that it was right to disclose it if the office did not abandon the inquiry.

The evidence of the medical gentlemen who heard the other evidence went to prove the use of the drug dangerous, and that, if they had known the habit, they would have mentioned it to the office ; but the one who had most practice in the use of the drug, mentioned instances proving, that persons taking opium in large quantities may live to a great age, and yet it may be a material fact.

This policy must be taken in the hands of the assignees with all its defects on its head ; but all they have to do is to lay the policy before you, leaving the defenders to make out its defects by

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proving clearly the taking the drug to a pernicious extent—that the office called for the information—and that it was so important, that Lord Mar, by concealing it, voided the policy.

If, on the whole circumstances, the habit is proved, and that he concealed a material fact, then you will find for the defenders ; but if you are not satisfied that the habit is made out to so great an extent, and that there was another cause for the depression,—or that explanation was not called for when it ought to have been demanded,—or that the fact was not of that materiality which would have raised the premium, or made the office reject the insurance, then you will find for the pursuer.

Verdict—“ For the pursuers, and that the  
“ defenders are indebted and resting owing to  
“ the pursuers in the sum of L.3000.”

*Cockburn, Skene, A. Anderson, and Forbes, for the Pursuers.  
Hope, Sol.-Gen., Jeffrey, D. F., and D. M'Neill, for Defenders.  
(Agents, Cranstoun and Anderson, w. s. and J. T. Murray, w. s.)*

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v.

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PRESENT,

THE LORDS CHIEF COMMISSIONER AND MACKENZIE.

MACKENZIE v. ROY.

1830.  
May 11, 12, 13,  
and 14.

THIS was an action to reduce a trust-disposition and a deed of settlement and entail on various grounds—the one relied on was fraud and circumvention, facility, and enorm lesion.

A jury discharged in terms of 55 Geo. III. c. 42, § 36, not having agreed in a verdict.

DEFENCE.—A denial of the truth of the facts stated and of the conclusions drawn.

## ISSUE.

Whether they were not the deeds of the late Mr Mackenzie of Dundonnell?

*Robertson* opened for the pursuer. \*—This

\* Before the case was opened, it was proposed that an individual should be inclosed with the other witnesses; but the Solicitor-General said he claimed him as an agent in the cause.

LORD CHIEF COMMISSIONER.—The objection is, that he ought not to hear the evidence of the other witnesses; but the counsel for the pursuer states that he has received instructions from the witness, and no one can suspect that the evi-

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is an extraordinary case ; and it will be necessary to go into much detail, and to show, that, from his earliest years to his death, the granter of these deeds was weak and incapable of receiving ordinary instruction suited to his rank—that he associated with idiots—was fond to excess of poultry—and that, when in the militia, it was necessary to have a serjeant near him to direct him.

The contract of marriage with the sister of the defender is unexampled, as it gives her a separate provision during the marriage, and declares it incompetent to sell the estate without her consent.

1 Hag. Ecc. Rep.  
401.

In the case of *Ingraham v. Wyatt*, 1 Hag. Rep. 401, Sir J. Nichol lays down the law on this subject in language better than I could use ; and in the case of *Bull v. Mannin*, March 1829, Lord Tenterden is represented by the short-hand writer as stating, That the question in such a case is whether the granter was capable of understanding what he did by executing the deed when its general purport was fully explained to him ?

dence of such a person will be affected by being present. This is not a case for drawing the rule tight.

The gentleman was accordingly not inclosed.



An objection of agency was taken to a witness, as he had seen the summons and defence, but was repelled.

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A witness received who had seen the summons and defences. The objection of enmity in a witness must be distinctly proved, and must be of a deep and serious kind.

When Mr Mackenzie of Millbank was called, he was examined *in initialibus*, but denied having used any threatening expression against the defender. An offer was made to prove the expressions used ; and when a witness was called for this purpose, the pursuer proposed to call a witness to contradict him.

*Cockburn.*—I state a good objection, and offer to prove it—one witness is called to contradict mine, but that is not sufficient.

*Hope, Sol.-Gen.*—There is no case where this was done after the witness denied malice ; besides we do not admit the relevancy, as we say a reasonable cause of malice must be stated of which the Court must judge.

LORD CHIEF COMMISSIONER.—Is there any practice of this sort in the Court of Justiciary ? If the objection is competently proved by two witnesses, we must reject him, but the leaning is always to receive the witness, and allow the objection to go to his credit. There is only one witness to the fact, and I cannot admit collateral matter in support of it.

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**LORD MACKENZIE.**—I have known this attempted in the Criminal Court ; but I wish to know whether there are other witnesses who can prove not merely scattered expressions, but serious malice, which is necessary to sustain the objection. There is no doubt of the objection being a very substantial one ; but it must be malice of a deep and serious kind, and not mere expressions. The cause of enmity ought also to be stated.

Incompetent to ask a witness whether, if on a jury, he would have cognosced an individual.

The objection was not insisted in ; and the witness being called, was asked whether, if he had been on a jury, he would have cognosced Dundonnel ?

**LORD CHIEF COMMISSIONER.**—You must ask as to facts, not the conclusion from them.

If a pursuer observes on letters proved on cross examination, they become his evidence.

In re-examining a witness, some questions were put as to the contents of two letters proved on cross-examination.

**LORD CHIEF COMMISSIONER.**—If you observe on these now I must consider them as your evidence.

A witness not allowed to refer to books not kept by himself.

An objection was taken to a postmaster producing certain books.

*Hope, Sol.-Gen.*—This was overruled in the case of Young and Aytoun, not reported.

*Cockburn*.—The case there was different, as the witness knew the fact but referred to his books for the detail. This witness knows nothing of the fact.

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LORD CHIEF COMMISSIONER.—The books in Young's case were to refresh the memory of the witness as a memorandum made at the time. But this witness was not the postmaster, and did not make the writing at the time ; he must therefore be considered as producing a document showing how the business was carried on at the time.

The instrumentary witness to the deeds was shown other deeds, and a question put as to them, to which an objection was taken.

A deed being proved, incompetent to prove by parol the transaction to which it relates.

LORD CHIEF COMMISSIONER.—You have done what is correct in proving the signature to the deeds, and I can never allow a defender to do more. You may ask questions independent of the paper ; but if you have any questions as to the transaction, these papers are the evidence of it, and you cannot get it by parol.

*Cockburn* opened for the defender and said, The question here is not as to the propriety of these deeds, but whether Dundonnel was ca-

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pable of having an object of affection? and the pursuer is bound to prove that, with the feelings and views which he had, these were not his deeds.

There are only two grounds on which they can be attacked, either that he was an idiot totally bereft of reason; and if this is your opinion no more need be said:—or that he was a frail halfling, who was practised upon by fraud, and this must be tried by *evidence*, not by Ross-shire clamour. We shall prove him a sensible man, with strong affection and resentment, and you must judge of him by his acts when roused to exertion, not when yielding to his natural obesity. He was in the army; he acted as chairman of meetings of justices of peace; and was engaged in numerous transactions in business, many of them with the pursuer. He disliked the pursuer, and was fond of the defender. The deeds were deliberately executed, and the scrolls were corrected by himself, and he survived the execution of them for five years.

There is no proof of facility, and, if that were established, there is none of fraud, intimidation, or solicitation. They say he hated the defender; and was it ever heard of that a person in such a situation could prevail on the other to give him his property?

When, in the course of the evidence, it was proposed to show a document to the jury, his Lordship remarked, that it was much better not to distract their attention till the whole was before them.

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Documents in general ought not to be shown to the jury during a trial.

It was doubted by the counsel for the pursuer how far Mrs Mackenzie's letters could be given in evidence, when his Lordship said, If it is part of a train, the competency depends on the fact. And when an objection was taken to the defender putting in letters addressed by others to Dundonnel,

Letters admitted to prove correspondence with a party, though not evidence of the facts stated in them.

**LORD CHIEF COMMISSIONER.**—They put in letters from a number of persons to Dundonnel, not for the purpose of proving any fact contained in them, but to show that these persons corresponded with him. You draw one inference from them, and they draw a different; but I see no objection to the production.

Mr Solicitor-General stated that the defenders should produce a mandate mentioned in the opening.

A document referred to in the opening for the defender may be produced by the pursuer.

**LORD CHIEF COMMISSIONER.**—I do not think I can compel this,—all I can say is, that they must produce the best evidence. Let the witness be asked whether the mandate is necessary to aid his recollection, and if so, it must be pro-

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The deposition  
of a witness re-  
ceived without  
evidence on oath  
that his illness  
was permanent.

duced. If necessary for the case of the pursuer, you may produce it.

An objection was taken to the production of the deposition of a witness.

LORD CHIEF COMMISSIONER.—I wished to enforce the strict rule, but there has been a relaxation at the Bar. My rule would have been, that I would grant a commission only where a witness was not likely ever to be able to attend; and I had been accustomed to see this granted only on affidavit, but I understood that here a certificate on soul and conscience was held sufficient.

*Hope, Sol.-Gen.*, in reply.—It is only by convicting the witnesses for the pursuer of perjury, that a verdict can be given for the defender. There is nothing in law, common sense, or general feeling, which warrants a man who can merely feel a preference in changing the order of succession to his estate; his right to do so implies that he has a sound and disposing mind, and is capable of managing his affairs with ordinary discretion. We deny that he had this capacity, but admit that he was not an idiot. He must understand *the* deed which he executes, and the powers he confers; not mere-

ly who is called to the succession. The presumption, no doubt, is in favour of a deed ; but Sir J. Nichol lays it down, that when the person benefited is the instigator of the deed, the presumption is the other way. In the present case the question is, whether he was capable of comprehending and originating *these* deeds, and if he was not, then there was contrivance from the first ; and if he did sign them, he did not know what he gave to the person favoured. The account given of the first instructions for the deeds is incredible, and if the evidence of the agent and clerk is deducted, the other witnesses prove Dundonnel a halfling ; and the letters on which the defenders rely could not be his own composition, and the letters from the defender to Dundonnel are evidently written for the purpose of evidence.

The deeds are not what were ordered—they are not in the form of the scroll—not in terms of the written instructions—nor in conformity with the instructions, as proved by the agent himself.

LORD CHIEF COMMISSIONER.—We have now been four days occupied with this case, and have had from fifteen to sixteen hours speaking upon it, and it is now sifted to the bran. It

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1 Hag. Eccl.  
Rep. 393.

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requires much abstraction to simplify the case for your consideration, after such brilliant addresses, and the examination of thirty-five witnesses on the one side, and twenty-three on the other. It would not be conducive to the ends of justice, were I to go over the case in detail ; but I shall endeavour to generalize it, and to state it in such a manner as to enable you to take a view of the whole. That your verdict will be according to your conscience, I have no doubt, and my anxiety is, that it should be final in the cause, and not infringe on any principle of law.

This settlement by entail cuts out the blood relations of the maker of it, but not those of his lady. In all countries real property has certain fixed rules attached to its conveyance from the dead to the living ; and the law of inheritance is held so sacred, that any violation of it creates a feeling which is apt to affect the mind in considering it. But sacred as the law of inheritance is, it is not more sacred, or more fit to be preserved, than the sacred right of disposing of property according to the will of the individual disposing of it, which is a right sacred and established in all civilized societies. It is the object of all wise systems of law to prevent any aberration from the intention of the proprietor, but



it is necessary that it should be the intention of a disposing mind. The only question, therefore, on this part of the case is, whether Dundonnel was of a disposing mind? The disposal of property must be free, but the disposal must be defended from fraud, force, fear, or circumvention, and by the law of this country a disposing mind is most clearly protected from all these. The law has also done much more than this, by establishing the wisest and best regulations for the protection of property, especially heritable property. These regulations are clear, short, and sure. The deed must be executed in a certain manner; and the forms being attended to, the deed becomes what is called probative, and establishes a right in the person favoured by it, provided the mind of the maker of it was capable, and was not influenced by fear or fraud. But if it is impugned on either of these grounds, then the proof of these lies entirely on the person who impeaches it. In this case it lies entirely on Thomas Mackenzie, who has brought a variety of evidence to establish two points. 1st, That his brother had not a mind capable of disposing of it, and that he was circumvented and defrauded. 2d, That if he was not absolutely unable to make the disposition, yet there is such evidence of weakness and facility, that

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the fraud and circumvention which took place are sufficient to set it aside.

Absolute incapacity is not made out, and, therefore, this last is the question for your consideration, and you will have to attend to the evidence of the facility and of the circumvention, and to say whether the schemes, the fraud acting on his facility, made him deprive the second son of his father of the family estate.

The issue is plain, and the one party says these were, and the other that they were not, the deeds of Dundonnel. In considering this, we have nothing to do with the situation of the trustees, or the hardship to the heir-at-law; these may influence feeling, but cannot influence the decision in a court of justice, which must depend on principles as applicable to the evidence.

There is no question here as to such fraud as would set aside the deed of a sound mind; but the question is, whether it is such as would affect a mind proved to be weak? I have great difficulty on the fraud and circumvention, as there is no specific act, which I can point out, of circumvention, or of fraud accompanied with circumvention, which can be made applicable to this case. The case depends on facts and circumstances, and you ought to keep steadily in mind, that, before coming to the conclusion,

that it is not the deed of Dundonnel, you must be satisfied on consideration of the circumstances proved, that they establish circumvention operating in *this* case.

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Much evidence was given to prove his weakness from a child, but from the situation he held in the militia,—afterwards living in a separate residence from his father,—managing his affairs,—and being left by his father without being cognosced or interdicted,—we must hold him as *sui juris*, and capable of managing and disposing of his property till the reverse is proved. If he is proved *facil*, then law protects him against a smaller degree of fraud and circumvention, and it is in this view that the evidence is to be considered. You will consider, *first*, the evidence as applicable to his mind in general, and then as applicable to the transaction as to these deeds, for it is as applicable to such a mind, that the facts and circumstances must be considered.

There was much evidence to show the weakness of his mind when a boy, but he may have recovered, and you had the opinion of some persons, competent to judge, that in after-life he was capable of understanding the propositions of the deed separately, and if this evidence stood alone it would be decisive, as the main question is, whether he chose his brother or brother-in-

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law to succeed him ; and as he wrote the name of his brother-in-law on the margin of the scroll, he must have understood this part of the deed ; and if there was no fraud or circumvention, this would validate the deed. There was much evidence as to his habits, (several of which his Lordship stated,) and certainly they prove him to have been a man of weak mind ; but though his conduct in presence of his servants and those in an inferior situation was degrading to his rank and character, his habits were different with those of equal or higher rank than his own. There was also evidence of the management he took of his estate, and of the pursuer writing to him as to bill transactions, and we find him doing all that any one else does in the world without any defect so far as appears.

With regard to the other part of the case, I cannot lay my hand on any fact showing imputation or circumvention. But it is said you must take all the circumstances together, and that if he had such a mind as to be influenced by these, then you should find for the pursuer. This is an important question, and differs from any we have had before; and you would require to consider it well ; but fraud, facility, and circumvention may no doubt be made out from facts and circumstances ; and if from these

you draw the conclusion, that there was fraud and circumvention acting on a *facil* mind, then you will find for the pursuer ; but if not well satisfied of the fraud and circumvention, you will find for the defender. The terms on which Dundonnel lived with his brother and brother-in-law, and the attempt of the brother to cut him out of the succession, by getting his father to execute a deed on deathbed, are material facts ; but it is also in evidence that Dundonnel did many kind acts to his brother.


As to the preparation of the deed, you find the defender is the copyist of the instructions for preparing a deed in his own favour, which was very incorrect. You have one gentleman declining to prepare the deed proposed, cutting out the heir, but sending a scroll of a deed in his favour. You have also the facts as to the deeds under reduction, and will say whether you consider Dundonnel a free agent in the execution of them ? It is said the instructions were for a simple destination, and that he may not have known the difference between that and an entail, but he got the scrolls and approved of them ; and there was evidence that he disapproved of the scrolls sent by the gentleman first applied to.

You must make up your minds whether these deeds were obtained by contrivance, whether they were made up in the family ; but

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in deciding this, you must not act on suspicion, but must be satisfied of it as a fact on the evidence. If his mind was weak and unduly imposed on, then the deeds cannot stand ; but if not, then he was a man *sui juris* ; he had the management of his affairs, and as this is a probative deed, it must have effect, though it excludes the heir-at-law.

*Skene*.—We wish your Lordship to explain to the jury what is meant by contrivance.

LORD CHIEF COMMISSIONER.—It must be clear, from facts and circumstances, that there was a contrivance by the persons concerned in making and obtaining the deed, amounting to fraud and circumvention ; at least that species of fraud which is not direct, but circumvents a weak mind.

The jury not having agreed in a verdict, they were discharged, after being twelve hours enclosed.

The case was again tried, and on the 8th January 1831, a verdict was returned for the pursuer.

*Hope, Sol-Gen. and Robertson*, for the Pursuer,  
*Cockburn, Skene, Rutherford, Penny, and Gibson-Craig*, for,  
the Defender.

(Agents, *Hugh Macqueen*, w. s. *Gibson-Craigs, Wardlaw*, and *Dalziel*, w. s. and *Mackenzie and Innes*, w. s.)

==  
PRESENT,  
LORD GILLIES.  
==

PATERSON  
v.  
SHAW.  
~~~~~

PATERSON v. SHAW.

1830.  
June 7.  
~~~~~

**THIS** was an action of damages for verbal and written defamation.

Finding for the  
defender in an  
action for de-  
famation.

**DEFENCE.**—The accusation was true—it was currently reported and believed—the circumstances justified the statement.

#### ISSUES.

The issues were, whether, on or about the 18th or 19th January 1829, the defender verbally accused the pursuer of cheating or playing falsely or unfairly at cards? Whether he made a similar accusation in a letter dated 18th January 1829, and in two printed statements in February, March, or April 1829? Or whether, on three occasions which were specified, (one of them in Great King Street) the pursuer did wilfully practice or use false or foul play at cards for the purpose of gaining money? \*

\* A motion having been made before the Lords Chief Com-  
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*Cockburn* opened for the pursuer.—If the accusations are false, then no damages can be too high; and if they are true, the conclusion must be directly the reverse; but this must be decided by the evidence, and not by what may have been stated elsewhere. The defender promised secrecy, and broke his promise. It was foolish in the pursuer to attempt to buy his peace by paying back the money, but the defender having taken it was bound to secrecy. The whole case turns on one issue in defence, and the defender has been misled, as no such meeting took place as is there alleged.

In an action for verbal slander, a witness having proved that he asked the authority for making the accusation, competent to prove the answer given by the defender.

The first witness for the pursuer was asked, on cross-examination, what reply the defender made when asked his authority for making the statement as to the pursuer?

missioner and Mackenzie to delay the trial, on the ground of the absence of a material witness.

The Dean of Faculty objected, that it was not sufficient ground for delay; that, in the opinion of counsel more witnesses were necessary, and that, if the case were delayed, it ought to be peremptorily fixed for another day.

**LORD CHIEF COMMISSIONER.**—The only point we have to inquire into, is the materiality of the witness and his absence, and both these are sworn to. If witnesses were spirited away for the purpose of delay, the Court would proceed; but it is impossible at present to do any thing but to delay the trial, which I regret, as the jury are here.



*Jeffrey, D. F.* for the pursuer.—No party is entitled to put any statement of his own in evidence, and we also object to any insinuation as to his having received information. As he pleads the truth, he is not entitled to bring evidence in mitigation, but must confine himself to his denial and proof of the truth.

*Hope, Sol.-Gen.*, for the defender.—We do not raise the second point on the evidence of this witness, but defend the question on the ground, that when a person is called to prove part of a conversation, we are entitled to ask him as to the whole, though we could not get damages on this unless supported.

*Jeffrey, D. F.*—It is impossible to hold this a continuation of the conversation, and it was not by or in presence of the adverse party. If they cannot recover on it, it is irrelevant.

**LORD GILLIES.**—The witness was examined in chief as to the statements, and has, on cross-examination, said that he asked the defender what authority he had for making them. When about to state the answer, he is interrupted by the Dean of Faculty; but it appears to me difficult at this stage to stop proof of the conversation. This is a proof of verbal slander, and how is the mitigation or aggravation to be

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judged of? If part of the conversation is not evidence, the Court will direct the jury to disregard it; but it may lessen or greatly aggravate the slander. I repel the objection.

The brother of the pursuer held not a necessary witness to prove a promise made to him by the defender, but examined of consent.

The defender had transacted with the pursuer's brother for the repayment of the money; when he was called as a witness, the objection of relationship was stated.

*Jeffrey, D. P.*—I admit that, in general, he would be inadmissible; but he is a necessary witness in consequence of the acts of the defender. This objection is got over in cases of occult crimes, and of instrumentary witnesses. This is a question where the defender's character is deeply at stake, and this the only individual who can speak to the facts.

*Hope, Sol.-Gen.*—If it were true that this was the only evidence of the fact, it would still be merely a question of prudence whether the objection should be taken. At present, I have only to state, that law will not trust an individual whose feelings are so deeply interested; and I am not disposed to trust him.

LORD GILLIES.—I am sorry the objection has been stated, but must deal fairly with it. I wish to know the fact to which he is said to be a necessary witness.

*Jeffrey.*—That the truth of the accusation was not admitted, or even stated or alluded to at the time of the agreement to repay the money, and that the compromise was gone into, on an acknowledgment of the total innocence of the pursuer.

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LORD GILLIES.—As to the promise of secrecy my mind is made up, and I would have admitted him to prove that. But what is now offered is not to prove this promise, but that the defender admitted that the pursuer was not guilty, and to this I must reject him; but the jury will take into consideration what has now happened.

*Hope, Sol.-Gen.*—Having got the judgment of the Court on the law, I consent to his examination.

An objection was taken to the question, what was the witness's reason for agreeing to the proposal.

Competent to ask a witness the reason he had for agreeing to a proposal.

LORD GILLIES.—If the witness is admissible, he must be competent to prove this. It is very difficult to admit proof of part, and not the whole of what passed. It is no proof of the reason which influenced the defender; but I

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think it competent to ask the witness what was his reason.

*Hope, Sol.-Gen.* opened for the defender, and said, The jury are not to try the general propriety of the defender's conduct, but only in so far as any expressions against the pursuer had been brought home to him. There was no question before them as to the defender having promised not to divulge the circumstances, but as it had been stated he would prove it false. It was said he invented and circulated the report to get back his money ; but the evidence is, that he said he had heard reports, and he did hear them. The thing was known to eight or nine individuals, and still the pursuer chose rather to pay back the money than stand the inquiry ; and after the decision against him by a court of honour, he brings this action of damages. Foul play is a subject most difficult to establish by legal evidence ; but if you are morally satisfied of it, then he does not come with clean hands, and is not entitled to damages. You cannot safely give damages, even if we fail in proving our issue, as we shall prove that he was suspected and watched, and that those who did so, warned their friends not to play with him, and that he was convicted by

the yeomanry and archers. He now comes into Court, trusting to the difference of moral and legal evidence; he called for inquiry, but failed before that tribunal, and in this action rests on the answer given in by the defender.

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The first witness called for the defender stated, that on a particular day he made a communication to the defender.

Circumstances in which a defender was allowed to prove a communication made to him as to the pursuer's character.

*Jeffrey, D. F. and Cockburn.*—We object to proof of the communication of any reports known to a few individuals only. There are one or two cases, in which, without much consideration, the Courts have allowed a defender to prove a general report in mitigation of damages, but this has never been done when a justification was pleaded.

In the Earl of Leicester's case, Sir James Mansfield allowed such a proof, and this was for some time acted on, but the first time it was questioned, the judgment was reversed. We do not object to proof of his general status in society.

E. of Leicester v. Walter, 2 Camp. N. P. C. 251.

— v. Moor 1813, 1 Maul and Sel. 284. Snowden v. Smith, 1811. Jones v. Steven, 11 Price, 235.

LORD GILLIES.—There is a peculiarity in this case, as it is not merely an attempt to prove a general report, but that it was communicated to the defender. If the question had been whether the communication was to others, the

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case might have been different ; but here the mitigation is rested not only on the bad character of the pursuer, but that a communication was made to the defender by a respectable individual.

*Robertson*, for the defender.—We allow full weight to the English cases, but they do not apply here, from the peculiar circumstances of this case. The pursuer has laid his case on a particular expression, and that must be held false unless we prove it true. The evidence now called is not to prove the accusation true, but to meet the allegation that the defender invented it. I will not argue the question whether proof of a general rumour is admissible ; but I know no rule here by which pleading a justification on record excludes mitigation.

*Jeffrey, D. F.*—They admit the argument, but rest on a misrepresentation of our case. Our complaint is not that he falsely said there was a report, but that the accusation was false. In the case of *Kingan and Watson*, it was held, that, though the plea in justification was bad, still, by taking it, the defender had given up the minor plea of mitigation.

*Kingan v. Watson*, 4 Mur. Rep. 490.

**LORD GILLIES.**—Were the general question before me, I would hesitate before giving a de-

cision. If the pursuer had been contented with the two first issues, this would not have arisen ; but I must take the case as proved ; and, in the fourth issue, part of the quotation is, that, on the day in question, the defender “ was, for the first time, informed of the existence of certain rumours,” &c. and the question is, whether the whole or any of the words are false, and can you say they are when the defender offers to prove them true. If the accusation had been confined to cheating at cards, the objection might be good ; but the pursuer has gone further, and I therefore admit the evidence.

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When another witness was called to prove a similar communication, the same objection was taken.

The same decision as to another witness.

LORD GILLIES.—This is also said to be false ; and on the grounds I formerly stated, I am equally clear that this is admissible. You say it is false, and I think he may prove it true.

When a gentleman was called to prove one of the issues in justification.

*Cockburn*.—This witness is called to prove what took place in Melville Street, the issue being as to Great King Street.

In an issue in justification, the defender, by mistake, having stated that a fact took place in the house of a gentleman in one street, incompe-

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tent to prove that  
the fact took  
place in his house  
in a different  
street.

*Hope.*—We twice applied to the Court to alter this, which was sufficient notice to the pursuer ; and though it was not then altered, it may now be held as accidental, or it may be struck out, as it was stated in Court that it might be amended if it appeared at the trial that it was a mistake and no surprise. I might on payment of costs have got the record amended.

*Jeffrey, D. F.*—The question is, whether, after evidence is given, the issue can be altered to suit it ? The motion when made was refused, and I will not argue whether the want of the street would have been fatal, as this is a wrong one, which is much stronger.

*LORD GILLIES.*—This difficulty takes me by surprise, and it ought to have been suggested that one of the Judges who heard the motion should have been present. The only analogous case to this which struck me from the first was that of a witness in the Court of Justiciary ; and in that case I should hold that, with persons so well known, it was no objection that they were stated to be in one street or another. I doubt if this is surprise, or any thing like surprise. Indeed, that objection cannot be seriously insisted in ; but this does not remove the difficulty, as the jury cannot find that this took



place in Great King Street, and if it is found to have taken place in Melville Street, that is no answer to the issue.

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As this gentleman does not live in Great King Street, I sustain the objection.

*Jeffrey, D. F.* in reply,—This is a case of painful anxiety to the pursuer ; and though he appears to come voluntarily into Court, he was driven to it in vindication of his character. The two points are, has the pursuer proved the calumnies uttered, and has the defender proved that he was the infamous cheat he represented him to be ? The defender extorted the money and then published the accusation. That the pursuer has proved his case cannot be doubted ; the only question is on the proof of the defence. The defender at one time seemed to hold that the pursuer must fail, though there was no proof of his moral guilt. The only proof of cheating is by proving a number of particular instances, and the question is, whether the defender has made out what he undertook to do. There was only evidence applicable to one occasion, and there the date was not the one stated in the issue, and you must hold, that, had the date been correct, the pursuer would have had a good defence. The whole proof is one

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witness speaking to one card, and there is nothing in which mistake is more apt to occur than in a person thinking he sees a card dropped in a rapid deal, especially when the mind is prejudiced.

LORD GILLIES.—This is a painful case, as the character of two gentlemen is deeply implicated in it. Though it has been made long, it is in fact very short, as the merits lie within a narrow compass. Counsel on both sides have shown great ability and zeal in discharge of their duty, and now we must do ours as well as we can; they have used every art of eloquence and ingenuity which they are privileged to use, and it is that and that alone which creates any difficulty in the case.

The first thing we have to do is to free our minds from their declamation and arguments, however plausible, and, according to our duty, to take a dispassionate view of the case, and to free ourselves from feeling when we consider the facts.

The parties here are in very different circumstances. The defender asks nothing at your hands, but comes to defend himself against a claim by the pursuer for L. 15,000. To succeed in such a claim, you and all must be satis-

fied that the pursuer comes with clean hands, and without stain or impurity. If, by his conduct, he has forfeited his character, we may regret the situation in which he is placed ; but he cannot come to a jury making such a claim.

As to the defender, he lost a considerable sum of money, and having got tolerable information, which he considered good, as to the pursuer's conduct at play, you cannot be surprised that he acted on it. If there had been no justification, you would still have been bound to consider this in mitigation of damages,—that it was not a malicious invention, but that he acted on belief, and that belief, founded on reasonable grounds, which must go far with a jury to show that the stain was fixed not on an uncontaminated character. That the accusation was made is almost admitted, which goes to show that the pursuer is not entitled to high damages. What may be the rule among gamblers I cannot say, but it appears reasonable that what has been gained by cheating should be repaid. I cannot, however, say that the defender acted in this case with that high spirit which might have been expected, and if he were claiming damages, his conduct as to the repayment of the money might enter into consideration ; but here he is

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merely defending himself. It is said he made a promise of secrecy and did not keep it. Had he been a man of high spirit, he would not have made such a promise ; if he knew of such conduct, there was as great impropriety in making, as in breaking, the promise. But this is not the question. You are to say whether you are to find for the pursuer. The accusation was made ; but if it is true there is an end of the case. Consider the evidence on this, and whether the conduct of the pursuer is that which you would have followed, had such an accusation been brought against you ? His answer to the proposal of referring the truth to some of his friends has too much the appearance of there being some ground for the accusation.

There is only one issue proved for the defender, but on another issue, from the turn the evidence took, you cannot draw any inference in favour of the pursuer, but merely that it is not proved. I was lost in wonder at the speech of the Dean of Faculty, as to the issue which was proved, for I cannot conceive any act of cheating more decided and clear than that which was proved by the witness. I wish I could consider him mistaken, but I cannot ; and, with respect to his being a single witness, you will consider the paying back the money,

and other circumstances. On the two joined together, you are to say whether you come to the conclusion that he cheated at cards, and that it is proved he did so.

LORD FORBES  
v.  
LEYS, &c.

Verdict—"For the defender."

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PRESENT

LORD GILLIES.

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LORD FORBES v. LEYS, MASSON, AND COMPANY.

1830  
June 14

THIS was a declarator by the heritors of the upper fishings on the river Don, to have it found that the defenders had not acquired right to draw off water from that river, or to have a dam-dike across it, and to have their dam-dike removed, as having been erected under a temporary permission, which was recalled.

Finding for the  
defenders, on a  
question whe-  
ther a dam-dike  
and canal were  
injurious to the  
pursuer.

DEFENCE.—The pursuers have neither title nor interest to object to the use the defenders make of the water, which is preferable to the rights of the pursuers, and they have acquiesced in and homologated what has been done by the defenders.

LORD FORBES

v.  
LEYS, &c.

ISSUES. \*

“ It being admitted that, in the years 1792  
“ and 1793, the defenders, Leys, Masson, and  
“ Company cut a canal on the north side of the  
“ river Don, for the purpose of conveying wa-  
“ ter from the said river to Grandholme  
“ Haugh, where the bleachfield and manufac-  
“ tory of the defenders are situated, and that  
“ in the year 1805 the defenders formed a  
“ dam-dike across the said river, for the pur-  
“ pose of conveying water into the said canal.

“ *Primo*, Whether the said canal, cut as  
“ aforesaid, is to the injury and damage of the  
“ pursuers, or of any and which of them, as  
“ proprietors of salmon-fishings in the said  
“ river ?

“ *Secundo*, Whether the said dam-dike,  
“ formed as aforesaid, is to the injury and da-  
“ mage of the pursuers, or any and which of  
“ them, as proprietors of salmon-fishings in the  
“ said river ? Or,

“ *Tertio*, Whether the whole or any, and  
“ which of the pursuers or their predecessors  
“ or authors, or their commissioners, trustees,  
“ or agents, duly authorized, acquiesced in the

\* The title of the pursuers was sustained, and the Issues sent by the Second Division of the Court of Session.

“ formation or continuance of the said canal ?

“ And,

“ *Quarto*, Whether the whole or any, and  
 “ which of the pursuers or their predecessors,  
 “ or authors, or their commissioners, trustees,  
 “ or agents, duly authorized, acquiesced in the  
 “ erection or continuance of the said dam-  
 “ dike ?”

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v.

LEYS, &c.

*Skene* opened for the pursuers and stated the facts.—The pursuers believed the injury to their fishings to be produced by the cruives, but discovered that it was by this dike. Many defences have been stated. It has been said there are many other dikes, and that till they are removed this must stand. But the Court will direct you that this is irrelevant, and that the extent of their works is equally so. If they bring evidence on their issues, we shall under these explain the delay.

At the close of the pursuers' evidence it was mentioned that a witness for the defender was unable to attend, but might be examined on commission.

A commission to examine a witness during a trial refused, as it was not alleged that he had been taken suddenly ill.

LORD GILLIES.—If you can prove that he was able to attend at the beginning of the trial, and was taken suddenly ill, this might be

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v.  
LEYS, &c.



done ; but you have no case unless he was well at the commencement of the trial.

*Jeffrey, D. F.* opened for the defenders and said, Their manufactory was one of the largest in Scotland, which had cost L. 200,000, and employed 2000 people, and that a verdict for the pursuers would give them nothing, and leave the defenders nothing. Fishings are diminished in all rivers, and it is the other obstructions in this river, and the vigilance of the lower fishers which has injured the fishings of the pursuers, which never were worth L. 50 a-year. But independent of this, they are barred by acquiescence, and it is necessary to explain the doctrine on this subject.

LORD GILLIES.—This appears to me quite unnecessary, as nothing will induce me to give any opinion on the subject of acquiescence. This is a question of fact ; if the pursuers have acquiesced the jury will find so, and if not, they will find the reverse. Acquiescence is an English word, and the definition of it may be got from a dictionary,—as a law term I am unacquainted with it.

*Jeffrey, D. F.*—There must be explanation




of what acquiescence is, and what I am to prove. If a party allows his neighbour, without objection, to lay out large sums of money in the construction of works, he is not to be allowed afterwards to challenge them to the ruin of his neighbour. This is equitable, and in this case there are innumerable circumstances which entitle the Court and Jury to presume acquiescence. Where an act is taking possession of the property of a neighbour, law and equity require some act on the part of the proprietor, as a gift is not to be presumed, though even here open possession has in some instances transferred property. But there is another class of cases, to which the present belongs, where the acts are done by a person on his own property ; and in this class, by not interrupting, the neighbour ceases to have a right to remove the work. In this case, mere publicity without direct evidence of the defender's knowledge, is sufficient to defend the works, especially after thirty years silence. The pursuers are to be presumed to have granted permission for erecting the dike and taking the water, and it was their interest to acquiesce, as it brought a number of people to consume the produce of their estates. Where the question is knowledge, notoriety is sufficient, and here the question is only

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Harvie, 2 Mur.  
Rep. 38.

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tacit acquiescence. There are circumstances showing the knowledge of each pursuer.

The issues being, whether a work was injurious, and whether the pursuers acquiesced—if the work is proved not injurious, held unnecessary to prove acquiescence.

After part of the evidence was led, Mr Cockburn stated, that they had proved that no injury was done to the pursuers, and, therefore, it was unnecessary to lead further evidence.

LORD GILLIES.—If the jury are satisfied that no injury was done, they may say so. In the acquiescence you stand as pursuer, but have no reply. It would be hard for the jury to sit here and listen to the other part of the case, if there was no injury to the fishings.

*Hope, Sol.-Gen.*—The party must take the risk if they choose to stop here. There were two motions before the Lord Chief Commissioner and Lord Mackenzie on this subject, which were refused, and the object of what is now proposed is to undo what was then done, and to have two trials. I am entitled to reply on the whole case, and if the party intended to stop here, was it fair to make so powerful an address on the other part of the case?

*Jeffrey, D. F.*—If this evidence is new to the Solicitor, the strength of it is little less new to us.

*Hope, Sol.-Gen.* in reply,—The whole case

was opened for the defenders, and you are now asked to confine your attention to the point of no injury being done, as if you had not heard the rest of the speech. That speech makes it necessary for me to reply on the whole case ; but you will be doing injustice if you allow what was said as to acquiescence to have any influence on your minds. You must consider this question as if the defenders were now erecting the dike, and if so, there is no doubt they have not shown sufficient ground to entitle them to do so. Much was said, but not proved, as to the diminution of the fish in the river, and also as to the height of the cruive and other dikes ; but if they are too high they may be removed ; and whatever may be the opinion of engineers and others who saw the river in flood, as to this one not being injurious, the fact, that the bed of the river is laid dry by it for half a mile, demonstrates the injury. The title of the pursuers is sustained, and they begin with the first dike in the river, and must take one at a time.


LORD FORBES

v.  
LEYS, &c.

1563, c. 68.

LORD GILLIES.—In cases coming before a jury, law and fact are frequently joined ; and when that is the case, it is the duty of the Judge to state the law, and the jury to take the

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v.  
LEYS, &c.



law so stated. But it is better when the case is free of that combination, and we are here in that desirable situation. Much law has been stated on both sides, but you shall hear none from me. On the one side, there was much ingenious argument as to acquiescence; and on the other, on the law as to cruives; but neither of these are here, and my duty is merely to bring you back to the issue.

If the judgment of Lord Cringletie sustaining the title decides, as was said, that this is injurious, then no issue would have been here. We are not to settle the law, but to answer one question as to a dam-dike, and another as to a canal; and the question is not whether, in certain circumstances and situation of the river, these would be injurious, but are they injurious? And to answer this question you may convert it and ask yourselves, whether the removal of the dike would be beneficial, and if it would, then it is injurious. Is this dike and canal injurious where it is, and in the circumstances in which it is? This is the subject to which your attention must be confined; and not the question which has been put to you whether the erection of it was wrong. The question is not the dimensions of the dike, or the effect of lowering it, but whether it is injurious to the fishings.

Evidence was given as to the dike, and that it laid part of the river dry, and that the fishings were fallen off; and had this been the whole I would have said it was injurious; but the evidence for the defenders must also be considered, and the witnesses for them who measured the dike, and also compared it with that of another manufactory on the same river; they state that if the other obstructions were removed, that this would not prevent the fish getting up. I do not know what effect this evidence may have upon you, but I cannot get over what they say as to the fish getting up if the other obstacles were removed.

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v.  
LEYS, &c.

The Solicitor-General requested his Lordship to note what he stated as to the other obstructions in the river. A Bill of Exceptions was tendered to the construction put on the issues, and the exception sustained by the Second Division of the Court.

Verdict—For the defenders.

*Hope, Sol.-Gen., Skene and A. Anderson, for the Pursuers.*

*Jeffrey, D. F., Cockburn, Lumsden, and Maitland, for the Defenders.*

MUCKARSIE  
v.  
FLEMING, &c.

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PRESENT,

LORDS CHIEF COMMISSIONER AND CRINGLETIE.

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1830.  
July 12.

MUCKARSIE v. FLEMING, &c.

Finding for the  
defenders on a  
question of  
wrongful arrest-  
ment of funds,  
and giving a  
charge of horn-  
ing after a sum  
of money was  
tendered.

AN action of damages against an agent and his employer for arresting the funds of the pursuer, and giving a charge of horning for payment of the balance of a bill after the sum was tendered.

DEFENCE.—The pursuer refused to deliver up to the agent a receipt said to be granted by the party for a partial payment.

ISSUE.

“ It being admitted, that on the 27th August 1827, the pursuer granted to the defenders, Fleming and Watson, a bill of exchange for the sum of L. 49, 9s. 1d. and that on the 5th day of January 1828, there was a balance of L. 32, 12s. 10d. due on the said bill :—

“ It being also admitted, that diligence was done on the said bill, and that arrestments were used by the said Fleming and Watson

“ in the hands of Pillans, George Russel,  
 “ and George and John Dron, on the 31st day  
 “ of December 1827 :—

MUCKARSIE  
 v.  
 FLEMING, &c.

“ Whether, on or about the 10th day of Ja-  
 “ nuary 1828, the pursuer tendered payment  
 “ of the said sum of L. 32, 12s. 10d. the ba-  
 “ lance of the said bill, to the defender Archi-  
 “ bald Walker, as the authorized agent, and  
 “ acting for the defenders Fleming and Wat-  
 “ son ?—And whether the defenders, or any  
 “ of them, wrongfully refused to accept the  
 “ said sum of L. 32, 12s. 10d. and to deliver  
 “ up the said bill, and loose the said arrestments,  
 “ —to the loss, injury, and damage of the pur-  
 “ suer ?”

*Robertson* opened for the pursuer.—The de-  
 fenders refused the sum tendered, and insinua-  
 ted that the pursuer had altered a receipt from  
 seven to seventeen, though he only stated it as  
 seven.

*Jeffrey, D. F.* opened for the defenders.—  
 The only point here is, whether we wrongfully  
 refused the money tendered ? Our request to  
 see the acknowledgment for the L. 7 was rea-  
 sonable, and the pursuer agreed to give it, but  
 he departed from his agreement, and wishes to  
 catch the defenders.

MUCKARSIE  
v.  
FLEMING, &C.  


LORD CHIEF COMMISSIONER.—This appears to me a very clear case. The facts appear from the admissions in the issue, and the question depends on the conduct of the one defender as agent for the other. It is clear that the pursuer went with the balance due on the bill, and if it had been a pure question on the tender, you would have had to consider whether damages were due or not. But there had been previous transactions between the parties, and it was a fit thing that the agent should get all the pursuer's receipts, that he might be able to show them to his constituents. The pursuer expressly agreed to give the receipt; and, therefore, the question is not whether his refusing to give it would have vitiated the tender. If he had given it, and the arrestment had not been taken off, there would have been a ground of action. The acceptance of the tender is clogged with a condition—he agrees to that condition—and if he had offered the receipt and the balance, and it had been refused, then it would have been a tender. The question turns on the wrongful refusal to accept,—the agent did not refuse, but proposed a condition, which was agreed to; but the pursuer gets bad advice, and does not fulfil his agreement; and can it in that case be said to be a wrongful refusal. The pursuer makes out



a case against himself; but if you have any doubt of this, the damages must be very trifling.

FRASER'S TR.  
v.  
FALCONER.

Verdict—"For the defenders."

*Robertson and W. Bell*, for the Pursuer.  
*Jeffrey and Cheape*, for the Defenders.  
(Agents, *John Johnson*, and *T. Leburn*.)

PRESENT,

LORDS CHIEF COMMISSIONER AND PITMILLY.

FRASER'S TRUSTEES v. FALCONER.

1830.  
July 13.

THIS was an action against an agent for having, without authority, made certain accusations in the pleadings in a submission, on account of which the pursuers had been found personally liable in expences.

Finding for the defender (an agent) in an action of relief brought against him by trustees who had been found personally liable in expences on account of statements made in the pleadings.

DEFENCE.—The pursuers sanctioned and approved of the pleadings.

ISSUES.

The issues contained an admission that the defender was employed to conduct the plead-

FRASER'S TR.

v.  
FALCONER.

ings in the submission, and that the pursuers had been found personally liable in expences. The question then was, whether the pleadings contained certain words, (which were quoted ?)

“ And whether, without the authority or sanction of the pursuers, and contrary to his duty, as agent aforesaid, the defender did insert, or cause to be inserted, the whole, or any part of the said words, in the said pleadings, or any of them, and did lodge, or cause to be lodged, the said pleadings, or any of them, in the said submission ? and whether the words so inserted and lodged, without authority, and contrary to his duty as agent aforesaid, were the grounds on which the said arbiter found the pursuers personally liable in payment of expences, and that they were not entitled to charge against the trust-funds the expences incurred by themselves, as aforesaid ? and whether, in consequence thereof, the defender is indebted and resting owing to the pursuers in the sum of L. 567, 3s. 5d. or any part thereof ? ”

*Robertson* opened for the pursuers, and stated the facts, which gave rise to the submission in which the statements were made.

*Jeffrey, D. F.*, opened for the defender,

and said,—This was a disreputable case, as the pursuers were fully aware of the statements, but wished to throw over the expence on the agent. It is only for *gross* negligence or mismanagement that an agent can be subjected, and here there was none, as the pursuers authorized and sanctioned the statements. I am not here to justify the statements made; but, in the circumstances, they were not such as to subject any one in expences—it is extravagant and monstrous to attempt to get them from an industrious agent.

*Skene*, in reply,—The real question is, whether a paid agent is or is not to relieve his unfortunate employers from the damage done to them by him? If he had acted with ordinary prudence, good sense, and temper, there would have been no such finding. There is no question here of the truth of the charges, as in every point the decree finds them unfounded. The question is not the malignity of the pursuers against the person accused, but whether the defender so acted as to free himself from the damage done by his conduct, and by persevering in charges after they were disproved.


LORD CHIEF COMMISSIONER.—This is not a question depending on malicious purpose, but

FRASER'S TR.

v.

FALCONER.

FRASER'S TR.  
v.  
FALCONER.



is a dry question, whether the defender discharged his duty in such a way as to prevent the pursuers from being relieved of the expences to which they were subjected by the Solicitor-General. When an agent is called on he is bound to do the service with fair professional skill, and if the client suffers from the want of this, the agent ought to be made responsible to the client; but the case is not the same as to statement of facts, many of which must be stated on the authority of the client, or, if not so authorized at first, still, if they are communicated to and approved by the client, the agent must be relieved. In the ordinary case, trustees who act for others, and act *bona fide*, are not personally liable for the expences of the trust; but in this case the expence is not laid on the trust, but on the individuals, on the ground that they asserted matter which ought not to have been stated.

There is no doubt the defender inserted the statements; the only question is, whether he did it under proper authority, or without it, and on his own responsibility? If he was the head and hand who did it, then the pursuers are entitled to relief. Stating them "without authority, and contrary to his duty as an agent," is the ground on which he is liable, but on the facts proved you are to say whether it was with-

out authority. To require evidence of authority for each detached fact, would render it impossible to conduct business. The question is, Whether, from the general authority, sanction, and approbation which he had, he acted according to directions in stating them? You must consider the facts proved as to the leading pursuer, and an important letter written by him; and if that amounts to acquiescence or approval, then this expence cannot be thrown on the agent. From what was proved, will you not presume that the pursuer knew the contents of the paper; and would it not be dealing too strictly with an agent to require proof of direct authority? When an agent acted fairly and honestly, and when his conduct was not checked but approved by the pursuer, will you subject him in those expences, or allow them to remain on the pursuer, where the arbiter has placed them?

FRASER'S TR.

v.  
FALCONER.

Verdict—"For the defender."

A motion for a New Trial was made in the Court of Session, but refused on the 3d February 1831.

A New Trial refused.

*Skene, Robertson, and Dauney, for the Pursuers.*

*Jeffrey, D. F., Forsyth, and Sandford, for the Defender.*

(Agents, *John Shand, w. s. and Alexander Johnston, w. s.*)

SPINK  
v.  
JOHNSTON.

PRESENT,  
THE LORD CHIEF COMMISSIONER.

1830.  
July 14.

SPINK v. JOHNSTON.

In an action to reduce a holograph deed, finding for the pursuer, subject to the opinion of the Court on a case.

**REDUCTION** of a holograph deed of settlement, on the ground of deathbed.

**DEFENCE.**—The deed bears a true date, and was not executed on deathbed.

**ISSUE.**

“ It being admitted that a deed bearing to  
“ be dated 14th January 1821, and of which  
“ No. 14 of Process is a copy, is holograph of  
“ the late James Spink, lieutenant in the royal  
“ navy.

“ Whether, at the time the said deed was  
“ executed, the said James Spink was *not* on  
“ deathbed ?”

*Neaves* opened for the pursuer.—This deed bears date six years before the death of the testator ; but it is sufficient if we prove its existence more than sixty days before his death. There was a person who saw it much more

than that period ; and there are minute circumstances in the deed itself, and the parties named in it, which confirm the truth of its date. The only question is, Whether one of the alterations in it was made on deathbed ? but the witness will prove that the deed she read contained alterations, and a provision in favour of the person there named.

SPINK  
v.  
JOHNSTON.  


The witness having stated that she read the deed, and having detailed a number of the provisions in it, was shown the deed, and desired to say whether it was the paper which she read.

A deed shown to a witness that she might prove its identity.

When the brother of the witness was called to prove a communication made to him by her,

LORD CHIEF COMMISSIONER.—You may prove that a communication was made to him, but not the contents of the communication.

One witness may prove that a communication was made to him by another, but not the contents of the communication.

*Skene*, for the defender, said, There were several points of law which could be better determined on a case than by a verdict.

LORD CHIEF COMMISSIONER.—This is the proper course in such a case ; but the jury must be satisfied that this is the will which was seen by the witness. It is established that a will in

MASON  
v.  
MERRY.

his handwriting existed years before the death of the testator ; the witness saw it in a place where it was natural that it should be, and at the time she mentioned to the other witness that she had seen it. As to the contents, they are not the question before you, but simply whether this is the deed she saw some years before his death ; and if you, the jury, are of opinion that it is, you will find for the pursuer on a case to be made up.

Verdict—" Of consent, the jury found for  
" the pursuers, subject to the opinion of the  
" Court of Session, on a case to be settled by  
" the parties."

*Hope, Sol.-Gen., and Neaves, for the Pursuer.*

*Skene and Bell, for the Defenders.*

*(Agents, James Morgan, and Thomas Deucher.)*

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PRESENT,

LORDS CHIEF COMMISSIONER AND CRINGLETIE.

1830.  
July 16.

MASON v. MERRY.

Finding for the  
defender in a  
reduction of a  
deed.

REDUCTION of a contract and other writings,  
on the ground of force and fear—that the con-  
tract was not read to the party—that the name



was traced by another person—that the witnesses did not see the subscription, or hear the party acknowledge it—that the deed ought to have been subscribed by notaries.

MASON  
v.  
MERRY.

**DEFENCE.**—The allegations are not true—the deed was reasonable, and is fortified by prescription—the pursuer has no interest, as she is bound to maintain the purchaser in his right.

#### ISSUE.

“ Whether the contract No. 3 of process,  
“ dated 20th March 1787, bearing to be a conveyance of certain subjects, situate in the  
“ city of Glasgow, to Marion Brown, widow  
“ of the late James Crawford, meal-dealer in  
“ Glasgow, was not the deed of the pursuer?—  
“ or,

“ Whether the pursuer homologated or acquiesced in the said contract?”

*Aytoun* opened for the pursuer.—This is a reduction on the ground of fraud and circumvention, and the want of formalities required by law; the pursuer was left at nine years of age without a relation to protect her, and from the terms of her contract of marriage, fraud is to be presumed. The only deed here is the con-

MASON  
v.  
MERRY.



tract, and the law is clear, *Ersk. B. 4. T. i. § 27*. She could not write, but her name was traced with pencil. By 1579, c. 80, notaries must sign when a person cannot write. The first issue is ours, the second is for the defender; but before making out homologation, it must be established that the fact was known to the party.

In a question whether a pursuer could write, incompetent to prove that she said to a witness that she could not, but the acts of the witness may be proved.

A witness having stated, that the pursuer could not write, and that he wrote for her, was asked what she said. An objection was taken to proof of any thing said by her, especially at a distance of time.

**LORD CHIEF COMMISSIONER.**—This may be got at in a different way, by asking him as to the act—why he did it, and showing by his own knowledge that she could not write; but if it was at a distance of time from the deeds, I should think it of little importance.

Books rejected as not lodged eight days before the trial.

An objection was also taken to the production of certain books by a clerk in Sir W. Forbes and Company's Bank, not having been lodged eight days before trial.

**LORD CHIEF COMMISSIONER.**—It is of very little importance here; but I think the objection good.

*Cockburn* opened for the defender and said,

MASON  
v.  
MERRY.



It was a case much more for the Court than the jury, as, if such a case were sustained, it was a dangerous precedent. The deed was regular, and the presumption in its favour; and this cannot be got the better of by whining about poverty, or statements as to fraud and circumvention, which is not the ground of reduction here. The question turns on the defective execution of the deed; and the pursuer hopes, at the distance of forty years, to get quit of a deed, because she says her name was traced with pencil before she wrote it, though the deed was sanctioned by her husband; and she said to the witness that it was her deed. This reduction is attempted to be made out by calling a witness, certainly not of the first credit; and they refuse to call the most respectable man of business under whose eye the deed was executed.

If one witness were sufficient to cut down a deed, no deed is safe; but here he is not only solitary, but will be contradicted by a witness above all suspicion. A party is not entitled to take advantage of her own fraud; and the long silence is sufficient proof of homologation.

When the agent who framed the deed was called,

MASON  
v.  
MERRY.

The agent who had charge of the execution of a deed, challenged on the ground of irregularity in the subscription, admitted as a witness.

Condie v. Buchanan, June 26, 1823, 2. Sh. and Dun. 432.

Frank v. Frank, 9th July 1793, and 3d March 1795, Mor. 16822 and 16824.

*Jeffrey, D. F.*, objects.—He is interested, as he is personally liable, if the deed was not properly executed.

*Cockburn*.—It was found in the case of Frank not to be a good objection to a witness that he is liable in an action.

LORD CHIEF COMMISSIONER.—That was a case in which the House of Lords reversed the judgment of the Court of Session. In the present case, we are of opinion that he is not incompetent as an agent, and that he has no such interest as excludes him.

*Jeffrey, D. F.*, in reply, said,—He could not abandon the case without some observations. The circumstances were suspicious, and afford the ground for laying hold of any legal nullity, and tracing the name renders it null. There is no proof of homologation, as the party must know the nature and extent of the right at the time he homologates.

LORD CHIEF COMMISSIONER.—The only observations which I shall make are applicable to the first issue, as evidence of homologation has not been gone into.

The question here is one requiring the great-

est possible attention ; and the pursuer is bound to prove, by the strength of her own evidence, that this is not her deed, before the Court and jury can be called to attend to it.

This is a deed which, being regular, is probative by statute ; and, to get the better of it, there must be such clear and distinct evidence as leaves no doubt on the mind. In this case, at such a distance of time, and the party knowing of the deed, it would require the strongest evidence.

It was matter of grave consideration whether a witness to a deed should be received, who comes to cut down his own solemn act ; but for several years it has been the practice to examine the witnesses to the deed ;—in this character the witness for the pursuer comes to undo what he attested to be regular. He says he knew it irregular, but that it was no business of his. It has been said that such a witness is admissible, but not credible. I think it is better to say that his evidence is to be scrupulously examined ; and here we must consider whether there is any thing to support this single witness, who comes to disaffirm his act.

His Lordship then stated the circumstances and the evidence as to the pursuer not being

MASON  
v.  
MERRY.



HAMILTON  
v.  
ANDERSON, &c.

able to write, and said it amounted to a presumption; but that the evidence of the agent on the other side was clear and direct, and went to support a deed and the law, against the evidence of a person in the situation of the witness for the pursuer who came to undo his own act.

Verdict—"For the defender."

*Jeffrey, D. F., Clephan, and Aytoun, for the Pursuer.*

*Cockburn, and D. M'Neil, for the Defender.*

(*Agents, Aytoun and Greig, w. s. and Thomas Darling, s. s. c.*)

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PRESENT,

LORDS CHIEF COMMISSIONER AND CRINGLETIE.

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1830.  
July 19.

HAMILTON v. ANDERSON, &c.

Damages against a party, his agent, and the messenger, for executing diligence against a son, on a bill accepted by his father.

THIS was an action of damages for wrongous imprisonment against a party, his agent, and the messenger, for apprehending the pursuer on diligence raised on a bill accepted by the pursuer's father.

DEFENCE.—The pursuer acted as if the bill had been his—the agent gave no instructions to the messenger—the messenger acted in the execution of his duty.

## ISSUE.

HAMILTON  
v.  
ANDERSON, &c.  


“ Whether, on or about the 14th day of  
“ April 1829, the defenders, or any of them,  
“ did wrongfully apprehend the pursuer, or  
“ wrongfully cause the pursuer to be appre-  
“ hended ; or did wrongfully imprison the pur-  
“ suer, or wrongfully cause him to be imprison-  
“ ed, to the loss, injury, and damage of the  
“ pursuer ? ”

*McNeill* opened for the pursuer and stated the facts, and that the case was an aggravated one, and particularly on the part of the agent, though he now wishes to shake himself free of it.

*Jeffrey, D. F.*, opened for the defenders, and admitted, That, by mistake, the son had been apprehended instead of the father ; but the question was, Whether this arose from the neglect or improper conduct of the defenders, or the want of sense in the pursuer ? The only fault of the leading defender was, not explaining that one of the parties in the bill was dead, and that he had a son of the same name ; the pursuer did not offer any evidence that he was not the party, and the agent and messenger would not have been warranted in not taking him.

HAMILTON  
v.  
ANDERSON, &c.

LORD CHIEF COMMISSIONER.—The issue expresses what you have to try ; and if you think the case made out against any or all of the defenders, you will find damages, but, in the circumstances, I would advise you to find moderate damages. A creditor is bound to know his debtor, and, knowing that the father of the pursuer was dead, he ought not to have allowed the agent to make out a mandate to execute the diligence against the son.

As to the agent, he lived near the spot ; and you will judge from what has been proved of his conduct, whether he was not bound to make farther inquiry before allowing the messenger to execute the diligence. The question is, whether he had probable cause for his conduct, it being established that there was no cause for imprisonment ? and whether, if he had good reason to capture him, he did not go beyond in taking him to a distance and imprisoning him without a sufficient inquiry ? but it is not a case where you will lean strongly against a man of business.

With regard to the messenger, he no doubt is an officer bound to obey his instructions ; but he must act with common sense. In the circumstances, he was not wrong in taking this person ; but when he was informed that he was



not the party to the bill, you will consider whether he ought not immediately to have communicated this to his employer.

BUTCHARD  
v.  
WALKER, &c.

It appears to me a case for moderate damages, and though you might find generally against all the defenders, I would recommend to you to find specially against each.

Verdict—"For the pursuer, — damages  
"against Anderson, L. 30, against Gilfillan,  
"L. 15, against Millar, L. 5."

*Robertson and A. McNeill, for the Pursuer.*

*Jeffrey, D. F. and E. Monteath, for the Defenders.*

*(Agents, Charles Fisher, and Wotherspoon and Mack.)*

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PRESENT,

LORDS CHIEF COMMISSIONER AND CRINGLETIE.

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BUTCHARD v. WALKER AND WEST.

1830.  
July 20.

THIS was an action by a tenant to recover compensation for improvements made on a farm.

Finding for the  
defenders in a  
claim for indemnification for improvements made on a farm.

DEFENCE.—The pursuer is not entitled to the profit arising from the improvements, but

BUTCHARD  
v.  
WALKER, &c.

to his outlay, under deduction of the benefit reaped by him from the improvements.

ISSUE.

“ It being admitted, that, on the 14th day  
“ of April 1821, the Directors of the Bank of  
“ Scotland let to the pursuer a certain portion  
“ of land in the neighbourhood of the village  
“ of Auchtermuchty, for the period of nine  
“ years from Martinmas 1821, under condition  
“ that it should be in the power of the proprie-  
“ tors to resume possession of the land at Mar-  
“ tinmas 1826, upon condition, however, of in-  
“ demnifying the pursuer for such improve-  
“ ments as he may have made on the lands, and  
“ not reaped the benefit of :

“ It being also admitted, that, on the 8th  
“ day of November 1825, the defenders pur-  
“ chased the said lands, and at Martinmas  
“ 1826 resumed possession of the same in terms  
“ of the said agreement ;

“ Whether the pursuer made improvements  
“ on the said lands, of which he did not reap  
“ the benefit prior to Martinmas 1826 ; and  
“ whether the defenders wrongfully failed to  
“ indemnify the pursuer for the improvements  
“ so made,—to the loss, injury, and damage of  
“ the pursuer ?”

*Anderson* opened for the pursuer.—The issue shows the question ; and it is a hard case for the pursuer, as the lands were in bad order, and he much improved them. He cannot now prove all he laid out on them, and the landlord got the four most profitable years of the lease. We are entitled to the profit drawn during these four years, and the defender will only allow us part of the sum laid out. We are at issue both on the fact and law. The case of *Sharp v. Burt*, 31st July 1788, Mor. 15262, shows the principle on which this ought to be decided. Having resumed possession, the proprietor must pay the loss suffered by the tenant.

*Cockburn*, for the defender.—It would save time if the Court fixed the point of law, as it would limit the proof to the outlay which had not been repaid.

**LORD CHIEF COMMISSIONER.**—From the question which has been raised, we naturally looked from the issue to the summons and defences ; and it appears to us, that both parties push the question to an extreme ; the defender maintaining that the pursuer is not entitled to any thing after he quits, while he maintains that he is entitled to all the profits that would arise during the lease. This question is brought

BUTCHARD  
v.  
WALKER, &c.  


Circumstances in which the Court would not fix the construction of a missive prior to the pursuer leading his evidence.

BUTCHARD  
v.  
WADKER, &c.




to trial on the issue before us ; and the real question is, whether he made improvements of which he has not reaped the benefit ? It appears to us that the construction of the missive requires him to prove that he made improvements, and that he was not indemnified. He is not entitled to his outlay ; but he must show the improvements, and that he has not reaped the benefit of them.

*Hope, Sol.-Gen.*.—I shall show that part of the land was of scarcely any value before the lease. The question now is, not whether the improvements extended over one, two, three, or the whole of the lease. The question is, whether he reaped the fair return on the improvements made by him ? Whether he is indemnified for the profit he would have made.

*Cockburn.*—The point is, that, if he laid out L. 100, he is to be *indemnis*, and we say that he is indemnified for the improvements.

LORD CHIEF COMMISSIONER.—The question is, whether he reaped the benefit prior to 1826, or how long he is to draw the return ? I wish the Court of Session had construed the terms of the missive ; but we will not at this stage restrict it for the one party, nor extend it for the other.

At the close of the evidence for the pursuer,  
LORD CHIEF COMMISSIONER.—Have you any one to prove exactly the comparison of outlay and receipt? If not, it appears to me there is some difficulty in the pursuer's case. There has been some loose evidence as to the improved value of the land, and on this I entertain no doubt; but the true question is, whether he reaped the benefit, and, for any thing which appears, he may be full in pocket? In the present position of the case, you (the jury) may find for the defender; but, if you are not prepared to do so, Mr Cockburn must proceed. I would only remark, that a case of this sort must be made out clearly and distinctly to the jury, by accurate computation of what *was* laid out, and *was not* received again.


BUTCHARD  
v.  
WALKER, &c.  


The jury not being prepared to find for the defender,

LORD CHIEF COMMISSIONER.—You must then resume consideration of the case without prejudice from any thing which has passed.

*Cockburn*, for the defender.—I cannot conceive any one who understands what a pursuer must make out, doubting in this case. The pursuer takes a lease for nine years with a break,

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v.  
WALKER, &c.



and what he is to get is not the profit he might have made—not the extravagant rent which has been stated—but if he lays out L. 10 on improvements, and increases the rent L. 100, still he only gets the L. 10. If he has drawn that from the improved land, he gets nothing from the landlord. The pursuer kept no account of his improvements, and there is not a particle of evidence showing that he did not reap the benefit of them prior to 1826.

LORD CHIEF COMMISSIONER.—From the course this case has taken, I shall go rather more at length into the state of the evidence than formerly. It is the duty of a Judge to tell the jury if he thinks the pursuer (who is bound to make out his case) has failed in doing so. It is the duty of the jury to find according to the principles applicable to the case. A judge may observe on the reason of the thing to a jury, and may state principles, but ought never to trench on the province of the jury, or press on them any opinion he may have formed of a fact, so as to prevent their deliberating on their verdict.

No jury can understand a case unless they understand the issue, and what they *are* and what they are *not* to try. In the present case,

BUTCHARD  
v.  
WALKER, &c.



the pursuer comes bound to prove not only that he made improvements, but that he has not been indemnified ; and if he fails in proving this, the defender is entitled to a verdict, as a verdict of not proven is not applicable in this Court. The agreement and the issue show that the question is not the profit he might have made during the remaining four years, but whether he was indemnified. A person entering into such a lease was bound to keep an accurate account of what he laid out and of what he drew in, but here neither has been proved—and things are in such a state that you can neither say the sum he laid out or what he drew in, and yet it is on the comparison of these that your verdict ought to rest. It is proved that he laid on lime and dung, but it is also proved that he reaped wheat and barley; and though you are not to conjecture what this put in his pocket, it is fair to say that this was a mode of cropping as likely as any other to put money in his pocket.

On the whole, I am sure your good sense will come to the same conclusion which I formerly stated shortly, that the pursuer has not sufficiently made out the burden of proof which is on him.

**Verdict—“ For the defenders.”**

*Hope, Sol.-Gen., and A. Anderson, for the Pursuer.  
Cockburn, and D. M'Neil, for the Defender.  
(Agents, John Johnson and Thomas Leburn.)*

HALLILLY, &amp;c.

v.

RAILTON.

1830.  
July 23.

PRESENT,

LORDS CHIEF COMMISSIONER AND MACKENZIE.



HALLILLY, &amp;c. v. RAILTON.

Finding that the estate of a bankrupt who had been employed to sell goods for ready money was liable for the price of goods sold on credit.

A petition and complaint against the decision of the trustee on the estate of one Drew, by which it was found that the pursuers were not entitled to rank on the estate for the price of certain goods transmitted to Glasgow for sale.

DEFENCE.—The pursuers knew and approved of the goods being sold on credit.

## ISSUE.

“ It being admitted, that, in the year 1821,  
 “ John Drew was employed by the pursuers  
 “ for the sale of certain articles at Glasgow, in  
 “ terms of the deed of agreement, No. 16 of  
 “ process, and that certain goods were, by the  
 “ pursuers, transmitted to the said John Drew :

“ It being also admitted, that John Drew’s  
 “ estate was sequestrated on the 5th day of  
 “ December 1826, and that the defender is the  
 “ trustee on the said estate :



“ Whether, on the said 5th day of December  
 “ 1826, the said John Drew was indebted and  
 “ resting owing to the pursuers in the sum of  
 “ L. 1660 Sterling, or any part thereof ?”

HALLILLY, &amp;c.

v.  
RAILTON.

*Neaves* opened for the pursuer, and said,—  
 Carpets were transmitted to be sold by Drew  
 for ready money ; and the question is, Whe-  
 ther he transgressed his instructions, and is  
 liable for the price ?—Whether, on account of  
 his misconduct, the pursuers are to rank on his  
 estate for the price of goods sold by him on  
 credit, though the purchasers may also be liable  
 for sums not drawn by him ? Having fixed  
 the goods on him, he and his trustee must free  
 themselves from them.

When a person in the same trade, and  
 through whom the letter of instructions had  
 been transmitted to Drew, was called to prove  
 the contents of the letter,

Circumstances in  
 which parol evi-  
 dence was admit-  
 ted of the con-  
 tents of a letter.

*Robertson*, for the defender, objects.—There  
 is no evidence that the letter seen by this wit-  
 ness was the one sent to Drew ; and parol evi-  
 dence is incompetent ; the letter-book of the  
 pursuers ought to have been produced.

*Hope, Sol.-Gen.*—There is no doubt of the  
 identity of the letter ; and we produced a copy  
 from our letter-book.

HALLILLY, &amp;c.

v.

RAILTON.

**LORD CHIEF COMMISSIONER.**—There is nothing in which the Court are more cautious than in admitting secondary evidence, unless the primary is not to be found. But here there is no doubt every thing was done to get the best evidence. The bankrupt says it is either lost, or that he gave it to his trustee ; and as he cannot produce it, there is the best evidence that the letter is not to be produced. This, however, does not entitle us to come to a conclusion as to its contents, separate from the writing. The first evidence is the writing, the next and weaker is the memory of man ; but this is in the present case stronger than what is contended for by the defender, viz. the letter-book.

What is the fact here ? This agreement is made at Glasgow, and one is made with the witness here at the same time. They are identical ; and the letter to Glasgow was transmitted open to the witness, who read it before sending it to Drew, who at the same time made an agreement on the same terms as to the same goods. What can be so strong evidence as that proposed to be given ?—It is higher than the letter-book, as there was a transaction founded on it.

**LORD MACKENZIE.**—I entirely concur.

The witness having proved the instructions,

**LORD CHIEF COMMISSIONER.**—The instructions being proved, there appears to me a conclusive right to recover, unless the defender can prove abandonment on the part of the pursuers.

*Robertson.*—The facts might be stated in a case.

**LORD CHIEF COMMISSIONER.**—There is now no ground for that, in consequence of the proof of the instructions, and that he did not act on them. The only way now is to prove that they let him off from the terms of these instructions, that they released him from the responsibility. It is not sufficient to show that the pursuers knew that he dealt on credit; this is merely the first step. It must also be proved that they took the purchasers as their debtors. The grand criterion of the case is, that the names of the purchasers were not transmitted. This would be a question for the jury, not the Court, but I would tell them that before finding for the defender they must be completely satisfied that the pursuers took the purchasers as their debtors.

The defender not being in a situation to prove this, a verdict was returned for the pursuers.

*Hope, Sol.-Gen. and Neaves, for the Pursuers.*

*Robertson, for the Defender.*

(*Agents, Brodies and Kennedy, w. s., and David Smith, w. s.*)

HALLILLY, &c.

v.

RAILTON.

The estate of a defender employed to sell for cash held liable for the price of goods sold on credit, unless he can prove that his employer sanctioned the sale on credit.

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v.  
ALLARDYCE, &c.

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PRESENT,

LORDS CHIEF COMMISSIONER AND MACKENZIE.

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1830.  
July 26.

ROBERTSON v. BARCLAY ALLARDYCE, &c.

Finding for the  
defenders, Justices  
of Peace, in  
an action for de-  
famation uttered  
by them while  
acting as magis-  
trates.  
April 8, 1830.

THIS case was first tried on the 24th of March 1828, and again on the 21st of July of the same year. See 4 Mur. Rep. 509 and 529. An appeal was taken to the House of Lords, who

“ Ordered and Adjudged, That the interlocutor  
“ of the Lords of Session of the Second Divi-  
“ sion of the 13th of December 1827, and al-  
“ so the three orders of the Jury Court, dated  
“ respectively the 7th of March, the 10th of  
“ July, and the 19th of December 1828, com-  
“ plained of in the said appeal, be affirmed :  
“ And it is declared that this House is of opi-  
“ nion, that the action of damages in the said  
“ appeal mentioned, could not be maintained  
“ without proof of malice, and that there was not  
“ in this case any proof of malice, nor any evi-  
“ dence from which malice could be inferred :  
“ And with this declaration, it is further order-  
“ ed and adjudged, That the said order of the  
“ Jury Court of the 15th of January 1829,  
“ and also the said interlocutor of the Lords of  
“ Session of the Second Division of the 14th of

“ May 1829, also complained of in the said  
 “ appeal, in so far as it declares the verdict fi-  
 “ nal and conclusive in terms of the statute, and  
 “ finds the respondent entitled to the expen-  
 “ ces incurred by him in discussing the bill of  
 “ exceptions, be reversed: And it is farther or-  
 “ dered, That, with the declaration and reversal  
 “ before-mentioned, the cause be remitted back  
 “ to the Court of Session, that the same may be  
 “ sent by the said Court to the Jury Court, with  
 “ an order that a New Trial may be allowed if  
 “ the respondent shall so desire.”

ROBERTSON  
 v.  
 ALLARDYCE, &c.


*Jeffrey, D. F.*, again opened the case, and stated the facts, and that the only question now was, Whether it was done maliciously, and that the vehemence of the expression indicated malice and a disposition to oppress? The former juries unanimously and indignantly gave their verdict.

*Hope Sol.-Gen. and Cockburn.*—This case is to be tried on its merits. What has now been stated cannot be proved, which shows that it is incompetent to state it. If it is intended to produce impression, that is what we call prejudice.

*Jeffrey, D. F.*—It is not usual to stop an opening counsel. I am entitled to read every

Circumstances  
 in which an  
 opening counsel  
 was permitted  
 at a third trial of  
 a case to make a  
 measured refe-  
 rence to the for-  
 mer trials.

ROBERTSON  
v.  
ALLARDYCE, &c.




word of the record, and if I am desired to stop, I shall leave the case in the hands of the Court and jury. I cannot do justice to the case if I am not entitled to lay the record before the jury, and no principle has been referred to on the other side.

LORD CHIEF COMMISSIONER.—The Court cannot lay down any different rule in this case from the uniform rule in all others, and which has not been violated except in the second trial of this case, and then the allusion was past before I was in a situation to notice it. I am sure if, at a second trial, allusion is to be made to the finding at the first, it brings before the minds of the Jury that which it is not desirable to have before them. It is said this may be laid before them in evidence ; but during the opening is not the time for deciding the admissibility of evidence ; and what may not be admissible at one time may be so at another. One difficulty in this case is from what has been done in the court of last resort. By the order made there on the bill of exceptions, no option was left to this Court in granting a new trial. From the special nature of the order in this case, and from reference to what was done in the House of Lords, perhaps some relaxa-


tion may be allowed in this case of a rule which I hope will remain fixed in every other. In opening, allusion may be made to the case having been formerly tried ; but no allusion ought to be made to the conduct of the jury, or to particular facts. A measured reference may be made to the former trials in this case, though not in others, and it may be done so as not to create prejudice. It is easy to state that there was a trial and a verdict, and a second trial and verdict, and that, on a bill of exceptions, the House of Lords ordered another trial.

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v.  
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*Jeffrey, D. F.*—Under this permission, I state that the trials took place, and that it is not easy to see how the House of Lords had the question of evidence before them. But it is now before you on the question, not of what took place, but whether the words were used from malice, culpable motive, or innocent misapprehension ? In the ordinary case, injurious words uttered, and not proved true, infer damage, as the law presumes them false and malicious. But if the person using them has a right to interfere, he is protected, and a larger proof of malice is required. This, however, is not spite, but any undue or culpable feeling towards the individual, and confusion has been intro-

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v.  
ALLARDYCE, &c.



duced here by attempting to draw a distinct line, which does not exist, between cases which are and which are not privileged. Is it to be tolerated, that, in such a question as came before the defenders, a vital stab may be given to the moral character of the defender?—A Judge may perhaps with impunity put a harsh construction on facts appearing in the case, or apply certain epithets. But the opinion of the Second Division shows that he is not entitled to introduce facts into the case; and if the introduction is culpable, or the facts irrelevant, that proves malice.


A witness having died since the former trial, it was agreed that his evidence should be read from the bill of exceptions.

LORD CHIEF COMMISSIONER.—The practice is to take it from the notes of the Judge; but as the bill of exceptions was prepared from my notes, and they are not here, this may be read.


*Hope, Sol.-Gen. for Barclay Allardyce.*—The chief object is to discard from your minds the inflammatory statements which have been made, and which differ so much from the case proved. We have nothing to do here with the poverty or riches of the parties, or the policy of



the game laws, or the oppression of this litigation. The pursuer has been litigating at the expence of the defenders ; but the House of Lords have found them in the right, and sent the case for trial again ; and the question is, Whether this was said from malice or bad intention ? and if it was not, then I plead to you in point of fact, and I call on the Court to direct you that the case is at an end. It is said to be a question for you, whether the situation protected the defender ? That question is not, and cannot be, with you, but the Court. The question for you is, Whether the defenders abused their situation, and made it a cloak for slander ? I admit the distinction of cases into those which are privileged and those which are not ; but I contend, that, in the class to which this case belongs, law does not presume malice ; but there must be proof as a fact of a feeling of hostility or ill-will, and that feeling must be against the individual, and not against poachers in general. Neither are you to judge of the propriety of such language in such a situation, but whether the situation was used as a cloak for the slander. When a person is in the seat of judgment, it is not sufficient that the statements are false and irrelevant ; they must be known to be so, and it is sufficient protection if

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v.  
ALLARDYCE, &c.  


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v.  
ALLARDYCE, &c.



he believed them relevant and true. They were relevant, as the pursuer put his character in issue. I plead to the Court, that, as there is no proof of malice, there is no case for your consideration.

*Cockburn*, for Boswell.—I agree with the pursuer, that this is an important question for the law of the land ; and this appears to me a case in which the experiment is tried how often a jury may be made to go wrong by mere clamour. The pursuer was accused of a crime, and one which is the source of all others, and, in judging of the penalty, the justices were bound to consider his character, and were entitled to act on private knowledge. Malice is not to be inferred from the intensity of the expression, but there must be personal enmity. It is said this is a case of oppression of a poor man by a rich ; but it confirms what I have always observed, that all the oppression I ever *heard* of was of the poor by the rich, and all I ever *saw* was of the rich by the poor.

There is here evidence that there was *no* malice, and though it is your province to judge of evidence, it is for the Court to say if there is a case, and you are morally bound to take the law from the Court.


LORD CHIEF COMMISSIONER.—I shall en-

deavour to state this case with the temper which I, and I am sure you, will consider it, without prejudice from the rank and situation of the parties, or from the former verdicts. It is an important but not difficult case,—important not only as finally settling the litigation between these parties, but as settling the sound principle on which the case ought to be decided. The first point is the proof of the words. 2. The character of the individuals who spoke them as Justices of Peace.—3. That they were strictly in their magisterial character at the time.—4. Whether the case is supported on proof applicable to such cases?

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Here the words were direct, not inferential; and if it had been one individual speaking of another in a private capacity, the law is clear. When an individual has no right to speak of another, and speaks slanderously, law infers, that, by speaking falsely, he speaks maliciously; but if he speaks in a matter where he is bound to communicate as a duty, such as giving the character of a servant, or an opinion on the solvency of a person with whom his friend wishes to deal, he is justified, provided the character or opinion is given fairly, and without malice. Here the defenders were sitting as justices, and bound to discharge their duty

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v.  
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to the best of their judgment. They may be wrong, but this is not sufficient, provided it is within their vocation, and that they are honest in the discharge of it.

The only question is, whether the words were spoken maliciously, and, from the nature of the evidence, if this had been the first time the case had come for trial, and if I had the power to nonsuit, I would nonsuit the pursuer, leaving it to others to correct this if erroneous; but here the case is in a situation to be decided by a verdict, which makes it necessary for you anxiously to consider the evidence.

The first point, then, is the proof of the words, and this I think the pursuer has sufficiently established.

The next is the situation in which the defenders were placed. They are admitted to be Justices of Peace and Commissioners of Supply, and they were in a court where they were called on for judgment against the pursuer, in a question on a revenue not a game act. After part of the evidence is admitted, the agent for the pursuer gives up the case, and applies for mitigation of the penalty, which may be reduced from L. 20 to L. 10. On this application, the one defender says it ought not to be mitigated, as the pursuer is a thief; and he refers to the other

defender, who does not say any thing till he is thus called upon, and then states that he was informed by a person that the pursuer had stolen bee-hives and leather, and the person who informed him being dead, it was competent to prove what he said. The statement was made in a small room, and not in any way different from the usual eagerness of the defender.


ROBERTSON  
v.  
ALLARDYCE, & CO

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The only question is the motive with which the words were spoken. If they had been spoken by one individual of another, law presumes malice from the falsehood ; but if a duty calls on a person to speak, then the presumption of law is, that the words were not maliciously spoken, but in discharge of the duty ; and it is incumbent on the party bringing the action to prove malice ; and if it is not distinctly proved, there must be a verdict for the defenders.

This is in substance, if not in words, the law formerly laid down in this case, and which has been sanctioned by the Court of Session and House of Lords ; and the ground on which this trial is granted was, that there was no facts proved to establish malice. Malice consists in having a bad, sinister, motive, in doing that from ill will which, separate from the motive, it may be right to do. How is this to be made out ? not from expressions used by an individual

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sitting in the seat of justice, deliberating on the question to be decided, though his expressions may be intemperate. I cannot say they were irrelevantly spoken, and therefore they are not of themselves sufficient proof of malice, but must be supported by facts and circumstances. The facts may be extrinsic or intrinsic ; they may arise out of the facts or separately. In the present case, there is nothing extraneous proved which can have any bearing on the malice. There was nothing to excite the feeling ; and you are not to conjecture, that, because the defenders take pleasure in the sports of the field, they have any hatred against an individual.

I leave the case with the perfect conviction that you will find for the defenders. It is seldom that there is no balance of evidence to be left to the jury ; but, in this case, I should be violating my oath of office if I did not state what I have done.

Verdict—" For the defenders."

*Hope, Sol.-Gen. Cockburn and H. R. Scott for the Pursuer.  
Jeffrey, D. F. Dundas, and Borthwick, for the Defender.*

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PRESENT,

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LORDS CHIEF COMMISSIONER AND MACKENZIE.

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DOUGALL  
v.  
RENFREWSHIRE  
BANK.

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1830.  
July 26.

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DOUGALL v. RENFREWSHIRE BANK.

THIS was a multiplepinding brought in name of the defenders for the purpose of trying the validity of an order, without a stamp, granted by the late Captain Dougall for the sum of L. 900.

ISSUE.

“ It being admitted that the pursuers are  
“ representatives of the late Captain James  
“ Dougall of Gourock,—

“ Whether, on or about the 28th day of July  
“ 1827, there was, in the bank of the defend-  
“ ers at Greenock, on deposit-account, the sum  
“ of L. 900, the property of the late Captain  
“ James Dougall ; and whether the defenders  
“ are indebted, and resting owing to the pur-  
“ suers in the said sum of L. 900 ?

*Wood* opened for the pursuer and said,—The question is, whether the defenders are due L. 900 which they paid on an unstamped order,

An heir claiming from a banker a sum of money paid on an unstamped order by his ancestor, must prove that the banker knew that the place at which the order was dated was more than ten miles from the bank.

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v.  
RENFREWSHIRE  
BANK.



dated more than ten miles from their place of business. By 55 Geo. III. c. 184. § 2, such an order is declared null, and we are entitled to payment, unless the Bank discharge themselves.

*Hope, Sol.-Gen.*—This is a question on the construction of the statute, and we wish the opinion of the Court on the first and second sections. We do not admit, that giving the money on this order was payment.

LORD CHIEF COMMISSIONER.—Does not the case depend on the *scienter*? In considering it, my attention was drawn to § 13, which refers to an order *known* to be issued beyond the ten miles.

*Jeffrey, D. F.*—They state that this is a document requiring a stamp, and that it is not stamped. If any question is to be raised as to the payment of the money, I must then withdraw my admission that it was in the Bank. But they admit on record that it was paid, and are not entitled to cavil as to there being no voucher. They wish to drop § 13 of the statute.

LORD CHIEF COMMISSIONER.—It appears to



me, that the question is for paying the money on an order without a stamp ; that the Bank paid in their own wrong ; and that the pursuers were entitled to claim as if the money was still in the Bank. The defence of the Bank is, that, though beyond the ten miles, they did not know it.

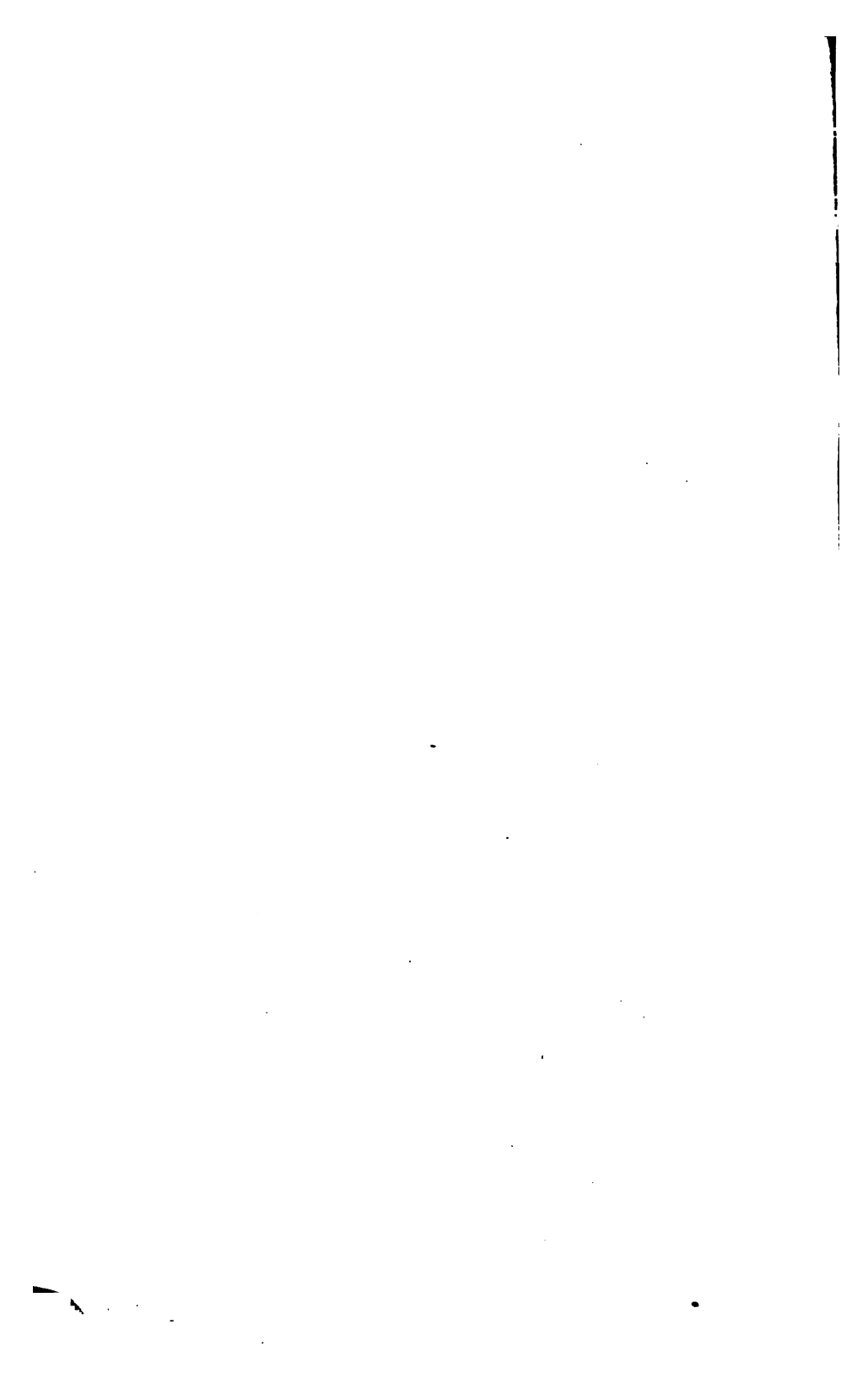
DOUGALL  
v.  
RENFREWSHIRE  
BANK.  


The two questions are, Whether this is a probative instrument ? And Whether, if probative, the Bank knew it to be dated more than ten miles from their place of business ? On the first I am bound to decide on the view of it, that this is a probative instrument without a stamp, and having it before us, we get to the other question.

The pursuer failed to prove the knowledge of the Bank, and gave up the case.

Verdict—For the defender.

*Hope, Sol.-Gen., and A. Wood, for the Pursuer,  
Jeffrey, D. F., Robertson, Scott, Dunlop, and Aytoun for the  
Defender.*  
(Agents, Robert Welsh, s. s. c. Pearson, Wilkie, and Robertson, w. s.)



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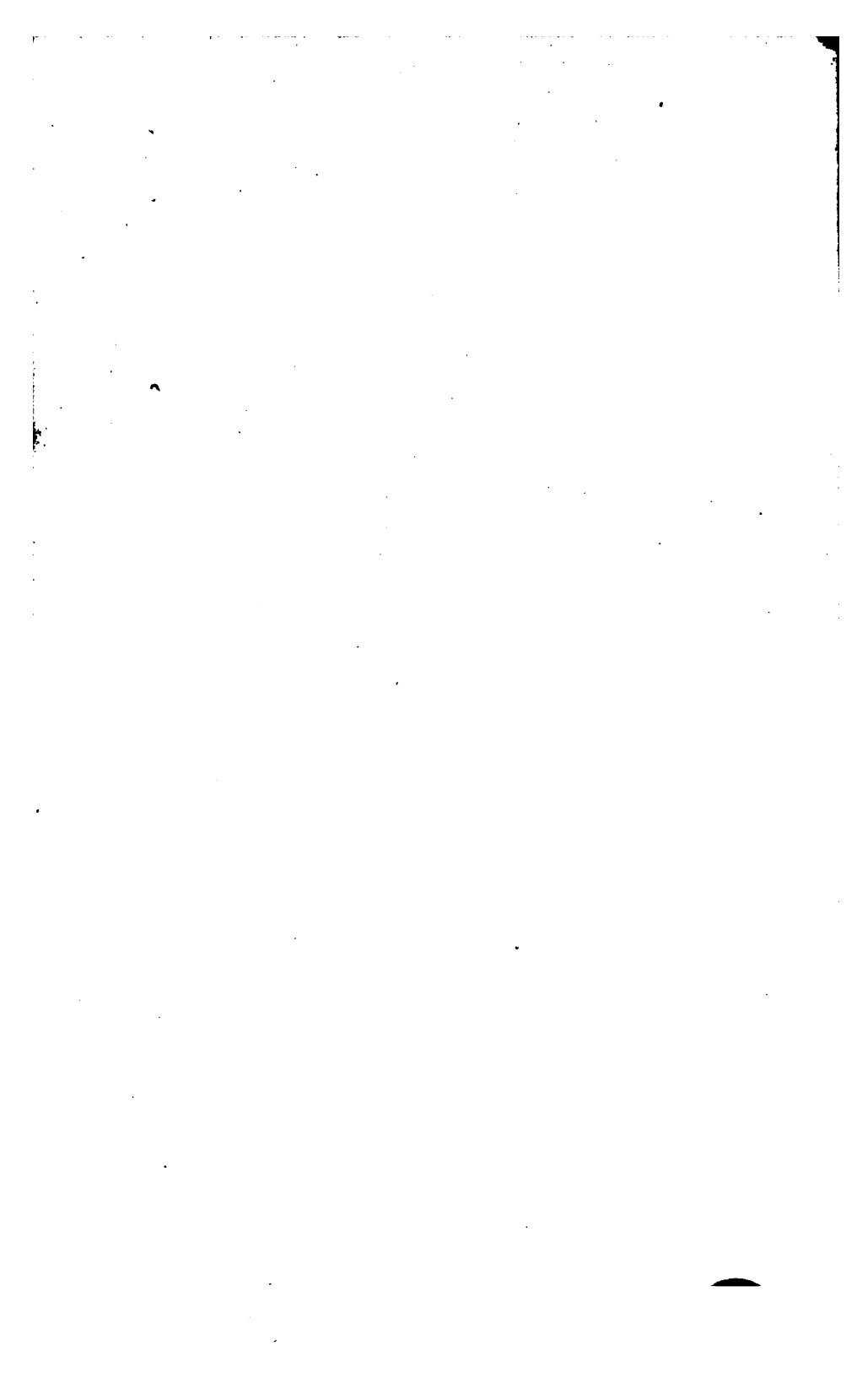
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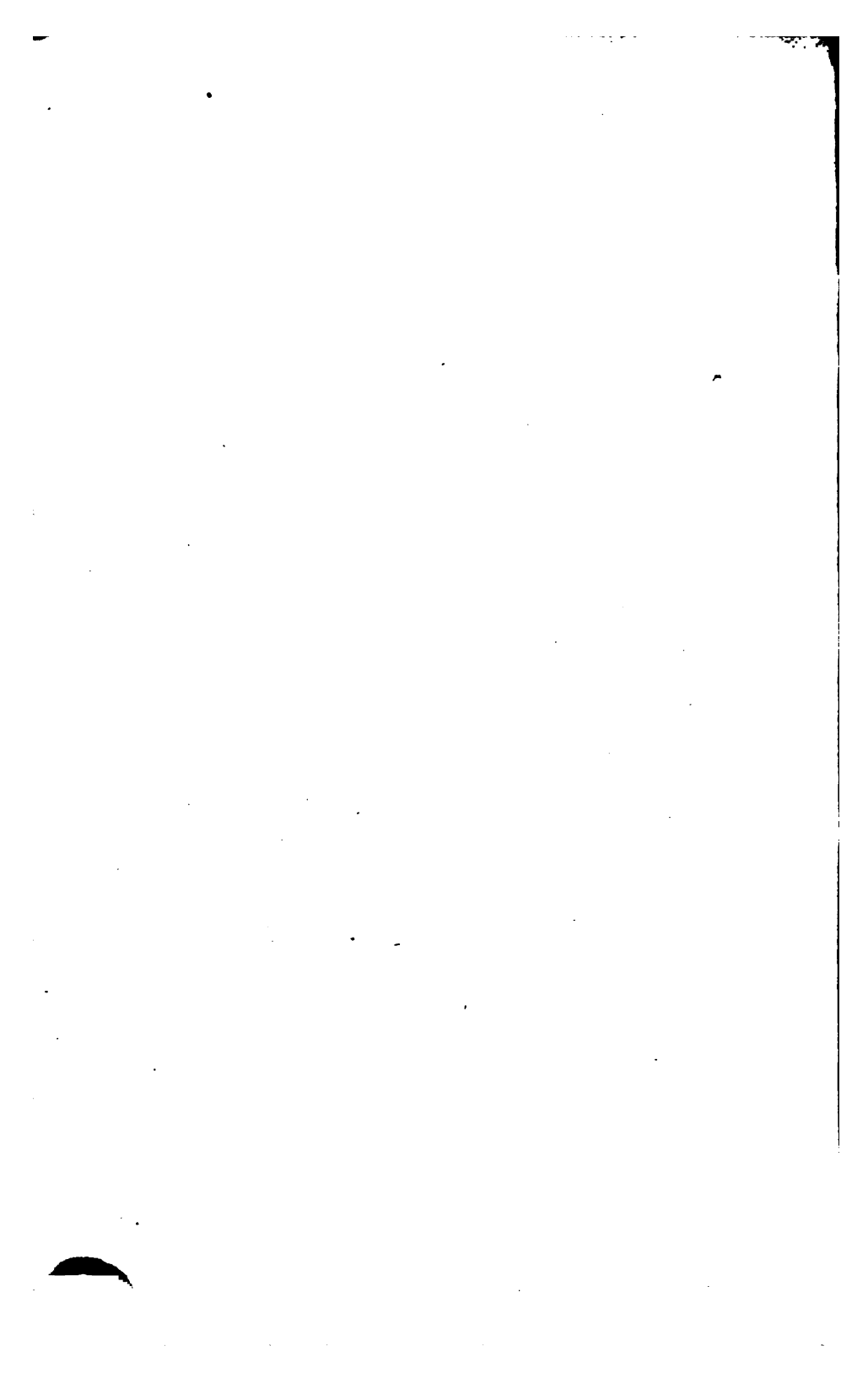
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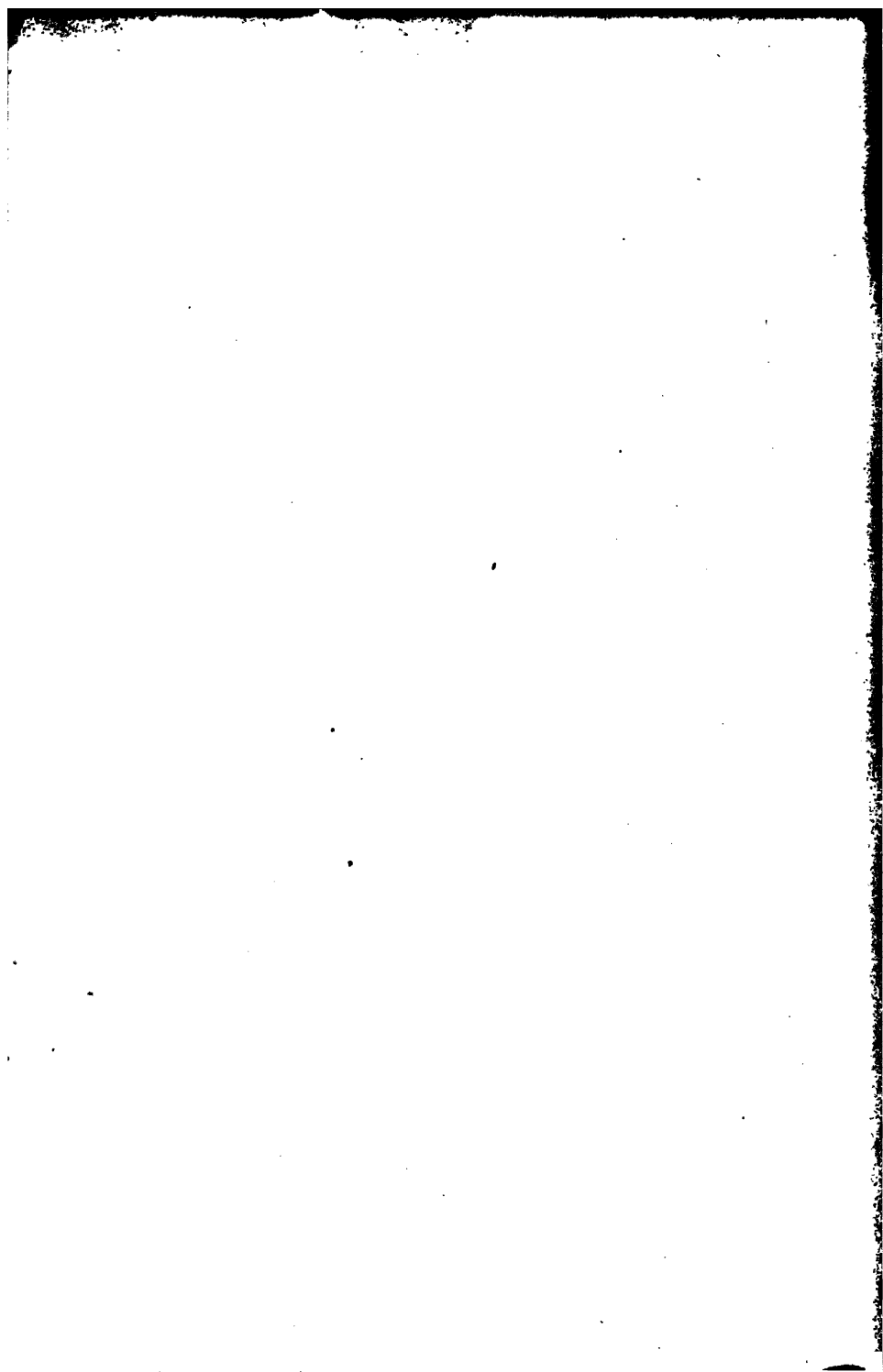
Page 28, note, *after* "proceedings," *insert* "of the Magistrates."

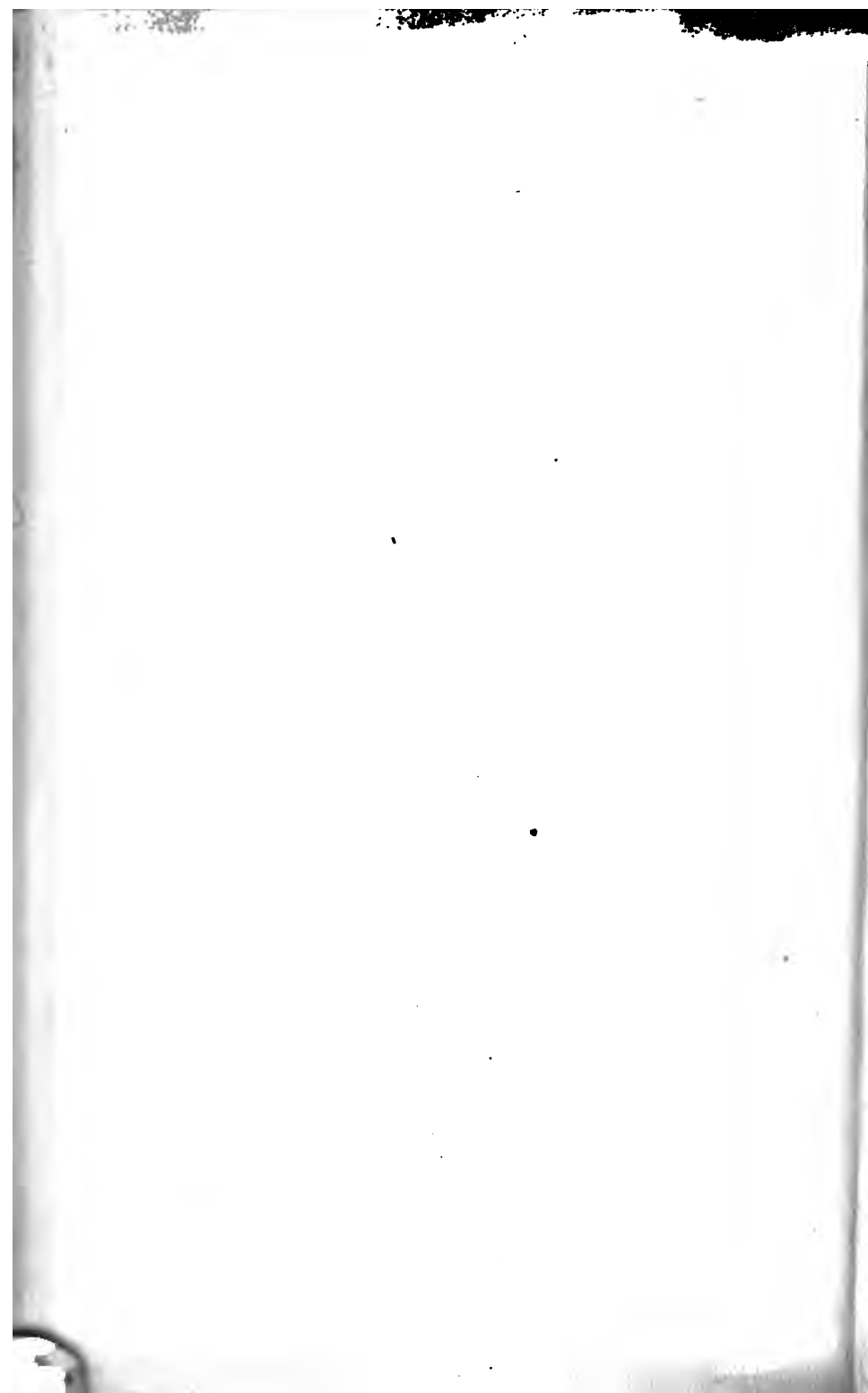
— 52, side-note, *delete* "or other articles."

— 120, side-note, *for* defender *read* pursuer.











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